Supreme Court, U.S.
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In The
Supreme Court of the United States

SUNRISE CORPORATION OF MYRTLE BEACH;
BOULEVARD DEVELOPMENT LLC;
S&H DEVELOPMENT INC.,
Petitioners,

v.

THE CITY OF MYRTLE BEACH;
MARK McBRIDE; JUDY RODMAN;
RACHAEL BROADHURST; CHARLES MARTINO;
WILSON CAIN; CRAIN WOODS; LARRY BRAGG;
TOM CONN; TOM DAVIS; SALLY HOWARD;
FRED ROURK, Individually,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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A South Carolina trial court and two state appellate courts found that the City of Myrtle Beach's denial of Petitioners' land-use plan was a violation of Petitioners' due process and equal protection rights. The Fourth Circuit Court of Appeals said it was not either, nor could it be, as a matter of law.

QUESTIONS PRESENTED

1. Does the eventual grant of a land-use development permit pursuant to state court proceedings absolutely preclude any § 1983 action against a municipality, where a developer suffers actual damages?

2. Should an entitlement bar apply to § 1983 land-use actions claiming violations of due process, where some circuit courts of appeals have specifically refused to apply this rule, and where this rule has been harshly criticized by commentators?

3. Does the Full Faith and Credit Clause and 28 U.S.C. § 1738 allow federal courts to disregard express holdings, findings of fact, and conclusions of law in a state court proceedings without any justification or rationale, where the courts of South Carolina would be bound?

4. Did the Fourth Circuit Court of Appeals err in refusing to recognize a violation of equal protection in prior state court proceedings based on this Court's precedent?

PARTIES TO PROCEEDING

All parties to this proceeding are set forth in the caption.

CORPORATE DISCLOSURE STATEMENT WITH RESPECT TO THE PETITIONER

Petitioners, Sunrise Corporation, Boulevard Development, L.L.C., and S&H Development, Inc., are South Carolina companies that have no parent corporation. No publicly-held company holds 10% or more of Petitioners' stock.

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Petitioners, Sunrise Corporation of Myrtle Beach; Boulevard Development LLC; and S&H Development Inc., respectfully pray that a writ of certiorari issue to review the judgment of the Fourth Circuit Court of Appeals, published in the Federal Reporter at 420 F.3d 322 (2005).

OPINIONS BELOW

1. The Order of the Fourth Circuit Court of Appeals, entered August 26, 2005, published in the Federal Reporter at 420 F.3d 322 (2005), and reproduced at App. at 1, *infra*.

2. The Order of the District Court for the District of South Carolina, Entered August 10, 2004, is unreported and reproduced at App. at 14, *infra*.

3. The Judgment from the bench of the District Court for the District of South Carolina, September 4, 2003, is unreported and reproduced at App. at 175, *infra*.

4. The Dismissal of the Writ of Certiorari from the South Carolina Supreme Court, dated December 19, 2002, is unreported and reproduced at App. at 34, *infra*.

5. The Decision of the South Carolina Court of Appeals, dated February 13, 2001, is unreported and reproduced at App. at 35, *infra*.

6. The Order of the Court of Common Pleas for Horry County, South Carolina, filed May 13, 1999, is unreported and reproduced at App. at 46, *infra*.

JURISDICTION

The Fourth Circuit filed its decision on August 26, 2005, and entered an Order denying Petitioners' Motion for Rehearing and an *En Banc* Determination on

September 23, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Circuit Court of Appeals' refusal to consider a claim for damages based on allegations of egregious executive behavior under 42 U.S.C. § 1983, and refusal to apply 28 U.S.C. § 1738 to prior state court proceedings. These provisions are reproduced in full at App. 83-89, *infra.*, and provide, in relevant part:

> No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST., amend. V

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST., amend. XIV, § 1

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. CONST. art. IV, § 1.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...

42 U.S.C. § 1983 (1979).

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738, para. 3 (1790).

STATEMENT OF THE CASE

The City of Myrtle Beach, South Carolina is located within the heart of a 60-mile stretch of coastline called the Grand Strand, which has over 70,000 lodging choices, and which receives approximately 13 million visitors annually.[1]

In 1996, Petitioners simultaneously formed S&H Development Corporation and Sunrise Corporation to buy

[1] MYRTLE BEACH CHAMBER OF COMMERCE, STATISTICAL ABSTRACT FOR THE MYRTLE BEACH AREA OF SOUTH CAROLINA , *available at*, http://www.myrtlebeach info.com /chamber/stats/16thstatabstract. pdf (printed Feb. 2005).

and develop certain property in Myrtle Beach. (Tr. Ct. Order, App. 48, *infra*) At the time, a small and aged hotel, the St. John's Inn, was operating on the property, despite being surrounded by newer high-rise condominiums. (*Id.*) Prior to purchasing the property, Petitioners verified their plans were consistent with the City's current zoning ordinances. (*Id.* at 49) The zoning ordinances placed the property in a TA-120 zone, which would allow construction of a 15 story high-rise with up to 400 condominium units, and the purchase price reflected a premium for this development potential. (*Id.*)

By 1998, Petitioners had purchased the property and had formed Boulevard Development L.L.C. in an effort to build an upscale condominium high-rise. (*Id.* at 49) The final plans called for a building that was aesthetically superior to other hotels on neighboring properties and clearly conformed to all applicable building codes and zoning ordinances in the City's code of ordinances. (*Id.*) In fact, Petitioners met on multiple occasions with the City staff to verify its plans met every specific and objective City requirement, and actually reduced the scope of their plans to 14 floors and only 98 additional units. (*Id.*)

Petitioners hired several prominent local experts, including an architect, a contractor, a consultant, and a marketing company. (*Id.*) Condominiums were pre-sold to individuals to obtain the financing necessary for construction and to sustain operations of all the entities operating on the property. The construction time line mandated the cessation of most operations on the property during the tourist season. (Damages Brochure, App. 191-211).

Petitioners had to submit their plans to the City's Community Appearance Board (hereinafter "CAB"), which is an aesthetic review process and the final step before getting a building permit. (Tr. Ct. Order, App. 49)

The City ordinances limit the CAB's review to several specific aesthetic issues, and provide that the CAB can not change any applicable setback, density, height, or other zoning ordinance. (*Id.* at 70) Under state law, the CAB has an affirmative obligation to provide specific and objective reasons should it deny its approval, so a property owner has specific guidance as to what it can do to obtain CAB approval. (*Id.* at 47)

Petitioners' plans were submitted to and rejected by the CAB on two occasions. (*Id.* at 50-52). On appeal, the City Council conducted two hearings in which Petitioners' plans were summarily rejected. (*Id.* at 52-58, 61-62) Petitioners then simultaneously initiated an action to have the CAB decision overturned in the state courts, and a parallel 42 U.S.C. § 1983 civil rights action, alleging that the City's flagrantly oppressive and abusive behavior was a violation of their Due Process, Equal Protection, and Fifth Amendment rights. (Am. Compl., App. 164-74) The §1983 action was removed to the United States District Court for the District of South Carolina, Florence Division, and stayed pending the outcome of the related state zoning appeal process. (4th Cir. Op., App. 5)

Almost seven years ago, the state Circuit Court filed an Order which conspicuously and expressly held that the City's actions were (1) arbitrary, (2) subjective, (3) without evidentiary support, (4) an abuse of discretion, (5) merely a pretense to stop development, (6) a denial of Plaintiffs' due process and equal protection rights, (7) contrary to Fifth Amendment law, and (8) ordering permit issuance. (Tr. Ct. Order, App. 13, 37, 43) The Trial Court Order was affirmed by the South Carolina Court of Appeals in 2001, and after briefing and oral argument the South Carolina Supreme Court declined further review in 2002. (App. 34-45)

Despite prevailing in the state courts, the extraordinary delay subjected Petitioners to unexpected

and insurmountable financial hardship. (Damages Brochure, App. 191-210) Faced with the threat of foreclosure and bankruptcy, Petitioners were immediately forced to sell portions of the property, including hotel units and the on-site restaurant and rental management company. (*Id.* at 206-08) Thus, even though Petitioners prevailed as to establishing their right to a building permit, they no longer own portions of the property due to catastrophic financial injuries, for which they filed suit in federal court. (Am. Compl., App. 164-74)

REASONS FOR GRANTING THE PETITION

A. THIS COURT SHOULD RESOLVE THE DEEP AND ENDURING SPLIT AMONG THE CIRCUITS IN THE RESOLUTION OF SUBSTANTIVE DUE PROCESS CLAIMS IN THE LAND-USE CONTEXT

While the District Court of South Carolina relied exclusively upon the current precedent of the Fourth Circuit, i.e. the "entitlement test," in dismissing Petitioners' due process claims, the Fourth Circuit Court of Appeals ("Fourth Circuit") refused to even consider its prior precedent and invented a new rule that also avoids any judicial review of oppressive and egregious governmental behavior.

1. THE CIRCUIT COURT OF APPEALS' DISMISSAL OF PETITIONERS' DUE PROCESS CLAIMS BECAUSE A BUILDING PERMIT EVENTUALLY ISSUED PURSUANT TO STATE COURT PROCEEDINGS IS CONTRARY TO PRECEDENT OF THIS COURT, OTHER CIRCUIT COURTS OF APPEAL, AND THE FOURTH CIRCUIT

The Fourth Circuit Court of Appeals decision below refused to consider Petitioners' § 1983 claim for damages because it held they "received the very remedy they sought, the permit to develop the property," and after five years of litigation in state courts this partial remedy is "an indication of the existence of procedural due process, rather than its absence."[2] While the Circuit Court of Appeals referenced the prior history of the parties in state court, it failed to acknowledge that the sole remedy provided by the state was a building permit to develop property, portions of which Petitioners' were forced to sell. This conclusory focus on the eventual issuance of a building permit issued pursuant to a court order is contrary to precedent of this Court, as well as all prior precedent of the Fourth Circuit.

This Court encountered a similar set of facts in *Cuyahoga Falls v. Buckeye Community Hope Foundation*, where developers brought a § 1983 action based upon due process and equal protection violations.[3] In *Cuyahoga*, the plaintiffs had brought a parallel state court action, and after the Ohio Supreme Court reversed itself, "[t]he City subsequently issued the building permits, and

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[2] *Sunrise Corp. v. Myrtle Beach*, 420 F.3d 322, 328 (2005) (hereinafter referred to as "Fourth Circuit Opinion," App. at 1-13).

[3] *Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 193, 123 S.Ct. 1389, 1393 (2003).

Buckeye commenced construction of Pleasant Meadows."[4] While this Court dismissed the developers' claims, their claims were not precluded by the issuance of a building permit subsequent to state court proceedings.[5]

In *Scott v. Greenville County*, the Fourth Circuit confronted a case with facts identical to the case at bar concerning this issue, where a developer brought an action in the state courts of South Carolina for the wrongful denial of a building permit, as well as a parallel § 1983 action based upon due process and equal protection.[6] In the state action the circuit court "issued an order requiring that the permit 'immediately issue' to Scott."[7] In the meantime, however:

> Scott's plans had fallen through, due to the pall cast over the project by the uncertainties of the state court litigation. Scott eventually sold his remaining interest in the project and the site for $162,000.00, a sum which he claims only partially offset several hundred thousand dollars in actual expenses and lost profits. He then filed this action.[8]

In reversing the District Court's dismissal, the *Scott* Court found "triable issues of fact which, if found in Scott's favor, support his theory of liability."[9]

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[4] *Id.*

[5] *Id.* at 199, 1396.

[6] *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983); *see also Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810 (1995) (state court mandating approval of plan was not basis for dismissal of § 1983 action).

[7] *Id.* at 1413.

[8] *Id.*

[9] *Id.* at 1421.

Additionally, the *Scott* Court summarily dismissed Greenville County's assertion "that the availability of state court postdeprivation relief precludes a due process action under § 1983."[10] Furthermore, no postdeprivation remedy is available in this case. While the State of South Carolina may provide for damages against its counties for the denial of civil rights, it does not provide a similar compensatory remedy against its municipalities.[11] Petitioners have specifically and repeatedly pointed to the lack of any compensatory state-law remedy that will restore their ownership in the subject property.[12]

Actual damages were an essential part of the remedy sought. Petitioners' have fairly alleged that their only recourse is a process that consists of years of litigation and no chance of any monetary remedy. When a court within an established state process finds a violation of civil rights, and subsequently fails to provide a monetary remedy as to actual damages, the procedural aspect of the Due Process clause is implicated. The state extensively legislates the system of zoning, and therein provides a

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[10] *Id*; *see also Daniels v. Williams*, 720 F.2d 792, 796 (4th Cir. 1983) (*citing Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434-437, 102 S.Ct. 1148, 1157-58 (1982) ("Section 1983 still provides a remedy for procedural due process violations resulting from some established state procedure ... and for violations of substantive constitutional rights. .... In these kinds of cases involving alleged violations of substantive constitutional rights, therefore, the presence or absence of a state remedy is irrelevant to whether a claim is stated under section 1983.")).

[11] *See* S.C. Code § 16-5-60 (2003) ("Any citizen ... obstructed in the exercise of the rights and privileges secured to him by the Constitution and laws of the United States or by the Constitution and laws of this State ... may claim and prosecute the county"), reprinted in full at App. 85, *infra*.

[12] Br. of Appellants, App. 149; Tr. of Mot. Hr'g, Dist. Ct. Ruling, App. 180-81 (Counsel for Petitioners stating: "There is no claim for monetary relief under state law for due process and equal protection.").

significant amount of deference to municipalities. Therefore, the state also should have an affirmative duty to provide protection assuring "[n]o person shall be ... deprived of life, liberty, or property, without due process of law."[13]

Petitioners have also fairly alleged they have a substantive right to be free of egregious and oppressive governmental behavior. Based on this Court's precedent, the state trial proceedings found competent proof of an equal protection violation.

2. THIS COURT SHOULD RESOLVE THE DEEP AND ENDURING SPLIT AMONG THE CIRCUITS IN THE USE OF AN ENTITLEMENT BAR TO DISMISS SUBSTANTIVE DUE PROCESS CLAIMS IN FEDERAL COURTS

Relying on the Fourth Circuit's precedent in *Gardner v. Baltimore Mayor & City Council*, *Biser v. Bel Air*, and *Sylvia Dev. Corp. v. Calvert County, Maryland*,[14] concerning due process claims in land-use cases, the District Court of South Carolina held that the abusive and oppressive behavior by the City and its CAB was "immaterial" to the case.[15] Since the City had "discretion" in giving CAB approval, this discretion prohibited any judicial review, even where petitioners had already proven the City intentionally and flagrantly used an aesthetic review process as a sword to re-zone their property.

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[13] U.S. CONST., amend V.; U.S. CONST., amend. XIV, § 1.

[14] *Gardner v. Baltimore*, 969 F.2d 63 (4th Cir. 1992), *Biser v. Bel Air*, 991 F.2d 100 (4th Cir. 1993), and *Sylvia Dev. Corp.*, 48 F.3d at 810.

[15] D. Ct. Order, App. 23.

The Fourth Circuit's precedent is contrary to controlling precedent of the United States Supreme Court, and the decisions of other Circuit Courts of Appeals. The Court should resolve the differences in the circuits concerning the use and application of the entitlement bar to due process in land use claims.

a. THE FOURTH CIRCUIT'S ENTITLEMENT TEST IS CONTRARY TO PRECEDENT OF THIS COURT IN THE ANALYSIS OF SUBSTANTIVE DUE PROCESS CLAIMS

The District Court identified the applicable Fourth Circuit precedent on the entitlement bar in due process cases:

> Boulevard's due process claims fail because it did not have a property right.... In the Fourth Circuit, a plaintiff has a property right in a building permit only if 'he has a legitimate claim of entitlement to it.' A plaintiff has a legitimate claim of entitlement to a permit if, 'under state and municipal law, the permitting authority lacks [any significant] discretion to deny issuance of the permit or to withhold its approval.'
>
> The focus of the Court's inquiry into whether a plaintiff has a state-created entitlement to the permit is always on the issuing agency's discretion; ... In other words, **it is immaterial whether the licensing agency abused its discretion in denying the permit.**[16]

This Court has evaluated and resolved § 1983 actions based upon claims of due process violations in the land-use context without adopting or relying on this analysis.

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[16] D. Ct. Order, App. 23 (emphasis added) (internal citations omitted).

In *Cuyahoga Falls v. Buckeye Community Hope Foundation,* in evaluating a developers' substantive due process claim, this Court stated "[w]e need not decide whether respondents possessed a property interest in the building permits, because the city engineer's refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct."[17] While the developer in *Cuyahoga Falls* was ultimately denied relief, this case stands for the proposition that official conduct **is relevant** in a due process analysis of executive action. The entitlement test bars any review of conduct.

Accordingly, this Court has "emphasized time and again that 'the touchstone of due process is protection of the individual against arbitrary action of government.'"[18] In a due process challenge to municipal action, the question is whether the governmental behavior is egregious and outrageously oppressive:[19]

> The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. But the zoning power is not infinite and unchallengeable; it "must be exercised within constitutional limits." Accordingly, it is subject to judicial review.[20]

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[17] *Cuyahoga Falls*, 538 U.S. at 198, 1396 (*citing Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708 (1998).

[18] *Sacramento*, 523 U.S. at 845.

[19] *See Id.*; *see also Cuyahoga Falls*, 538 U.S. at 198 (behavior was the dispositive factor in substantive due process claim).

[20] *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (*quoting Moore v. East Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., concurring in judgment)).

The federal courts should be able to scrutinize claims of outrageous governmental behavior, yet the Fourth Circuit's entitlement test precludes any review of official conduct, and thereby provides a local government license to ignore the Constitution. Petitioners respectfully submit that this should not be the law in any circuit.

While this Court has not addressed the issue of whether the entitlement test should apply where a developer has been subjected to abusive and oppressive behavior by a local government in the land-use context,[21] a majority of the circuit courts of appeals have applied the entitlement standard to resolve these disputes.[22]

b. THE ENTITLEMENT TEST HAS BEEN EXPRESSLY REJECTED BY SOME CIRCUIT COURTS OF APPEALS, BASED ON LOGICAL INCONSISTENCIES, WHERE PROPERTY OWNERSHIP IS ONLY A BENEFIT, REASONING IS CIRCULAR, AND PERVERSE INCENTIVES ARE CREATED

Criticisms of the entitlement test in the land-use context are not hard to find or understand, and have led some courts of appeal to reject the entitlement bar. In this regard, the origin of the entitlement standard is important.

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[21] Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation*, 3 Wash. U J.L. & Pol'y 61, 65 (2000).

[22] *See Gardner*, 969 F.2d at 68 (*citing Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989); *RRI Realty Corp. v. Vill. of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989); *Carolan v. Kansas City*, 813 F.2d 178, 181 (8th Cir. 1987)); *see also Triomphe Investors v. Northwood*, 49 F.3d 198, 202 (6th Cir. 1995); *Crown Point I, LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1216 (10th Cir. 2003).

The entitlement test emerged in the landmark case of *Board of Regents v. Roth,* where this Court analyzed the procedural due process right of a non-tenured professor who was informed, without any explanation, that he would not be rehired.[23] The Court started the due process analysis by attempting to define constitutionally protected interests:

> The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. ....
>
> 'Liberty' and 'property' are broad and majestic terms. ... The Court has also made clear that the property interests protected by procedural due process **extend well beyond actual ownership of real estate, chattels, or money.**[24]

Since Professor Roth's interest was not grounded in the ownership of real estate, chattels, or money, the Court looked to see whether State law had vested him a with a constitutionally protected interest. The Court set forth the entitlement rule to define new state created property interests:

> The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms. ....
>
> Certain attributes of property interests protected by procedural due process emerge from these

---

[23] 408 U.S. 564, 566 (1972).

[24] *Id.* at 569-72 (*quoting National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1956) (Frankfurther, J., dissenting)) (emphasis added).

> decisions. To have a property interest **in a benefit**, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. ...
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law....[25]

Several factors are important to note. *Roth* involved procedural due process in the employment context. Second, and most importantly, the Court was considering whether to expand Constitutional protection, not whether to limit it.[26] States may create an entitlement to a benefit, called "new property." "New property is different from 'old property,' which is the property interest in the ownership of the land."[27] Nevertheless, some federal courts have relied on *Roth's* entitlement test to minimize constitutional protection for land owners asserting substantive due process challenges to land-use decisions.

The first, and most fundamental problem with the use of entitlement test in land use cases – as well as the foundation of it – is the characterization of the lawful use

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[25] *Id. at 576-77* (emphasis added).

[26] Mandelker, *supra* note 21, at 74 (The entitlement test was clearly "intended to expand rather than diminish property rights, and ... land ownership requires constitutional protection even if a landowner does not have an entitlement to a land use approval.").

[27] *Id.* at 65.

of property as a governmental benefit. The reasoning behind this classification is not intuitive,[28] and while the Fourth Circuit has not confronted this logical inconsistency, the Third Circuit has, and subsequently rejected the entitlement bar:

> [O]wnership is a property interest worthy of substantive due process protection. Indeed, one would be hard-pressed to find a property interest more worthy ....
>
> [W]e are less certain [than other circuits] that the "legitimate claim of entitlement" approach is mandated by Supreme Court jurisprudence. [A] property interest within the meaning of the Fourteenth Amendment includes not only what is owned but also, in some limited circumstances, what is sought.[29]

The Seventh Circuit also rejected the classification of ownership of property as a governmental benefit with the following thoughtful analysis:

> The Constitution says that no State [may] deprive any person of life, liberty, or property, without due process of law. ... Without a legitimate claim of entitlement there is no property.
>
> [Petitioner] may well have lacked a property interest in one classification rather than another. But it surely had a property interest in the land, which it owned in fee simple ... **An owner may**

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[28] *See RRI Realty v. Southampton*, 870 F.2d 911, 917 (2d Cir. 1989)("It is not readily apparent why land regulation cases that involve applications to local regulators have applied the *Roth* entitlement test ... instead of simply recognizing the owner's indisputable property interest in the land he owns").

[29] *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, at 600-01, n.9 (3d Cir. 1995) (internal citations omitted).

> **build on its land; that is an ordinary element of a property interest.** Zoning classifications are not the measure of the property interest but are legal restrictions on the use of property. Licenses, permits, and classifications are important to owners because they reflect governmental promises not to interfere with private uses of property, but let us not confuse a decision not to intervene with the property itself.
>
> ... Those things people can hold or do without the government's aid count as property or liberty no matter what criteria the law provides. ... Otherwise a single local ordinance providing that "we may put your land in any zone we want, for any reason we feel like" would abolish all property rights in land overnight. The due process and takings clauses are made of sterner stuff.[30]

Second, the Fourth Circuit's entitlement test also presents a circularity problem:

> A municipality simply has to announce in its land use regulations that land use approvals, such as site plan approvals, do not confer an entitlement. The municipality accomplishes this by adopting a land use ordinance that gives it the discretion to grant or refuse the approval. This discretion defeats a claim of entitlement, which exists only if a municipality has a mandatory duty to grant the approval.[31]

The entitlement rule means a municipality has no constitutional obligation to follow careful procedures, and property interests only exist when they have been

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[30] *River Park v. Highland Park*, 23 F.3d 164, 165-66 (7th Cir. 1994) (internal citations omitted)(emphasis added).

[31] Mandelker, *supra* note 21, at 66 note 23.

granted as a special benefit, of which "the political branches may deprive individuals of that interest without following due process."[32]

c. THIS COURT SHOULD RESOLVE THE SPLIT IN THE CIRCUITS AS TO THE APPLICATION OF THE ENTITLEMENT TEST

There is a division of authority even in the application of the entitlement test in those circuits that apply it in land-use cases. In *George Washington University v. the District of Columbia*, the D.C. Circuit Court of Appeals recognized that even among the circuit courts of appeals which have adopted the entitlement test:

> [T]here is considerable variety in the courts' formulae for how severely official discretion must be constrained to establish new property. The Second Circuit apparently will not find one if the authority has any discretion to deny approval of the proposed land use. The Eighth Circuit, in contrast, inquires whether the "statute or regulation places substantial limits on the government's exercise of its licensing discretion."[33]

The *George Washington* court then decided "the Eighth Circuit's analysis is more in line this Court's precedent."[34]

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[32] Tim Searchinger, Note, *The Procedural Due Process Approach to Administrative Discretion: The Courts' Inverted Analysis*, 95 YALE L.J. 1017, 1021-23 (1986).

[33] 318 F.3d 203, 207 (D.C. Cir. 2003) (*citing Natale v. Ridgefield*, 170 F.3d 258, 263 (2nd Cir. 1999); *Bituminous Materials v. Rice County*, 126 F.3d 1068, 1070 (8th Cir. 1997)).

[34] *Id.*

The court found that in practice zoning statutes typically "divide into two sets, one set involving virtually unlimited discretion, the other rather absolute entitlement."[35] Even though the University needed a special exception, and the zoning statutes actually gave the municipality broad discretion, the court weighed the facts and circumstances and found that there were "substantial limits on the government's exercise of its licensing discretion."[36] The court then considered the alleged behavior of the municipality and found there was no due process violation.[37]

In the case at bar, Petitioners were subject to a purely aesthetic municipal ordinance, in which discretion was significantly limited by state law.[38] Petitioners did not need a special exception as their project was expressly permitted by the zoning laws in force at the time. Thus, there is little doubt that this case would have been decided differently in other Circuit Courts of Appeals, and the D.C. Circuit Court of Appeals would most likely have found that Petitioners had an entitlement and a property interest.

The Fourth Circuit decision below refused to confront these important issues in applying the entitlement test, even though it had originally recognized the importance of reviewing municipal behavior in *Garner v. Baltimore*:

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[35] *Id.*

[36] *Id.* at 208.

[37] *Id.* at 209-11.

[38] *See* Tr. Ct. Order, App. at 47, 80 (Under South Carolina law, if a developer is going to deny a land owner's development plans, that denial has "to be supported by objective nonarbitrary reasons which tell the developer what corrective actions can be taken in order receive building approval") (*citing Peterson Outdoor Adver. v. Myrtle Beach*, 489 S.E.2d 630 (S.C. 1997)).

> In **most instances**, ... decisions regarding the application of subdivision regulations, zoning ordinances, and other local land-use controls properly rest with the community that is ultimately-and intimately-affected. ....
>
> We believe [the entitlement] standard appropriately balances the need for local autonomy in a matter of paramount local concern **with recognition of constitutional protection at the very outer margins of municipal behavior.**[39]

The Fourth Circuit's entitlement test has become an absolute bar, where discretion is always dispositive, and behavior is never relevant. The courts within the Fourth Circuit are not balancing local autonomy with constitutional protection in any instance, because discretion has absolutely nothing to do with behavior.

d. DISCRETION AND OFFICIAL CONDUCT ARE BOTH RELEVANT, AND CONDUCT IS MORE IMPORTANT AS DISCRETION IS SUBSTANTIALLY LIMITED

If substantial power over property and land use is to be allocated to local governments, why should the amount of discretion in a local statute even be a factor in determining whether there has been an abuse of that power? As the *Gardner* Court noted, heated political battles between developers and the community are a necessary and predictable evil in the land-use context.[40] However, landowners should not be subject to unfair municipal conduct:

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[39] 969 F.2d 63, 68, 69 (4th Cir. 1992) (emphasis added).

[40] *Id.* at 63.

> One protects oneself against the predictable evil by not participating in the risky venture, by not purchasing the property that needs the seldom-granted **zoning change**. It is precisely because exit is relatively available at local governmental levels that predictability can test fairness. ... [L]and use changes occur in a climate of regulation, and **if developers are aware of the climate they can account for it in private arrangements; it is only the unforeseen governmental action that is unfair.**[41]

As the *Gardner* Court realized, a developer can look to the municipal statutes to see if the project he proposes is expressly allowed, or whether he will need a variance or a special use permit before he buys the property.

Like most states, South Carolina imposes an onerous burden upon a project not allowed by the zoning ordinances, i.e. it needs a variance or special exception.[42] Where developers know the subject property needs a variance, special exception, or a zoning change, as in *Gardner*, *Biser*, and *Sylvia*, they are starting out on the wrong side of the law, and there is no **unfair** surprise when their plans are rejected. In the case at bar, however, Petitioners were applying for a use expressly permitted by the City's zoning ordinances, and the only approval needed was under the City's aesthetic review ordinance, a review which is substantially limited by state law.[43]

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[41] Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 907 (1983) (Article cited as support for the entitlement standard in *Gardner v. Baltimore*) (emphasis added).

[42] *See* S.C. CODE § 6-29-800 (1976) (requiring an unnecessary hardship with extraordinary and exceptional conditions).

[43] Tr. Ct. Order, App. 50.

The CAB ordinances which are the subject of this action were discussed by the South Carolina Supreme Court in *Peterson Outdoor Advertising v. Myrtle Beach.*[44] The *Peterson* Court held that a municipality's application of aesthetic ordinances must have "clear standards to limit the subjective exercise of discretion by the enforcing authorities," and the municipality must provide legitimate reasoning to inform the developer as to what corrective actions can be taken.[45] In *Peterson*, the City of Myrtle Beach was warned that the use of aesthetic review to deprive a property owner of the lawful use of property is not a valid exercise of "discretion." In sum, the City's intentional and egregious behavior was not just a surprise – it was an unfair surprise.

While the entitlement test is correct in that discretion is an important factor in the land-use context, to the extent that the entitlement bar renders oppressive governmental behavior immaterial or irrelevant, it is wrong. Discretion should not be a bright-line test that arbitrarily closes the federal courthouse doors.

B. THE FOURTH CIRCUIT SANCTIONED THE DISTRICT COURT'S FAILURE TO ADHERE TO THE FULL FAITH AND CREDIT CLAUSE AND 28 U.S.C. § 1738, WHEN IT CHOSE TO DISREGARD THE STATE TRIAL COURT PROCEEDINGS WITHOUT ANY JUSTIFICATION OR RATIONALE, WHERE THE STATE COURTS WOULD BE BOUND

The Fourth Circuit's decision correctly states that after a full trial in the state court, the City's actions were found to be: (1) arbitrary, (2) subjective, (3) without evidentiary support, (4) an abuse of discretion, (5) merely

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[44] 489 S.E.2d 630 (1997).

[45] 327 S.C. 230, 234, 489 S.E.2d 630, 632 (1997) (citing 6A McQUILLEN MUN. CORPS. 24.15 (3d ed. 1997)); Tr. Ct. Order, App. 47.

a pretense to stop development, and (6) **a denial of Plaintiffs' due process and equal protection rights.**[46]

In footnote 6 of the Fourth Circuit's decision, without any rationale or justification, the court states the South Carolina Court of Appeals decision is the only one that will be given any preclusive consideration. Since the South Carolina Court of Appeals had reviewed the Trial Court Order under an "any evidence" standard of review, this is an impermissible collateral attack and an error of law:

> These five stated issues essentially present two arguments. First, did the trial court err in reversing city council's decision because **there is evidence in the record to support the decision**? Second, did the trial court err in substituting its judgment for that of the City Council?[47]

The State Court of Appeals answered the first question in the affirmative, and importantly, went on to state that the City's actions were unjustified, illegal, and that remand would be futile. Subsequently, that court expressly held:

> Based upon our review of the trial judge's findings, we find no error. The decision of the trial court is **AFFIRMED.**[48]

Petitioners' due process and equal protection claims were litigated in the state courts of South Carolina, and from the beginning the City acknowledged federal claims

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[46] Tr. Ct. Order, App. 46-47, 80 (emphasis added).

[47] *Boulevard Dev. v. Myrtle Beach*, Op. No. 2001-UP-091 (filed Feb. 13, 2001), App. 42 (emphasis added) (hereinafter S.C. Ct. of Appeals)).

[48] S.C. Ct. of Appeals, App. 45.

in the state courts. For example, the City's Amended Answer, dated March 10, 1999, asserted "In further answer to the Complaint, and as a Ninth Defense to it, the Complaint ... should be dismissed as to some or all of the Defendants because the same claim is pending in another action."[49] In the City's Motion for Summary Judgment dated January 18, 2000, the City asserted: "As these issues have been adjudicated in the lower state court, and are currently pending there on appeal, the doctrine of res judicata precludes [Petitioner] from relitigating the same issues in this forum."[50] Thus, the City was aware of the federal claims, and prayed for claim and issue preclusion.

Under 28 U.S.C. § 1738, all federal courts must give full faith and credit to state court judgments,[51] and this statute extends res judicata to actions under 42 U.S.C.A. § 1983.[52] Section 1738 "does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it ... **commands a federal court to accept the rules chosen by the State from which the judgment is taken.**"[53] In *San Remo Hotel, L.P. v. San Francisco*, this Court expressly held that federal courts may not create exceptions to this statute.[54]

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[49] Def. Answer at ¶ 44 (filed Jan. 15, 1999), App. 249.

[50] Def. Mot. for Summ. J. at 24 (filed Jan. 19, 2000), App. 246-47.

[51] 28 U.S.C.A. § 1738, App. 83; *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 466, 102 S. Ct. 1883 (1982).

[52] *See* 15 AM. JUR. 2D *Civil Rights* § 142 (2002).

[53] *In re Genesys Data Tech., Inc.*, 204 F.3d 124, 127-28 (4th Cir. 2000) (*quoting Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S. Ct. 1327 (1985)).

[54] 125 S.Ct. 2491, 2493 (2005).

South Carolina law relating to res judicata is clear. To establish res judicata, a party must show: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the claim in the former suit.[55] All three are easily satisfied in this case as to the City.

As to the first element, a final judgment on the merits in a prior action will preclude the parties and their privies.[56] The City was a defendant in this action as well as the state court action. The second element, identity of the subject matter, is also easily satisfied because both the state court proceedings and this lawsuit unquestionably arise from the same factual and legal basis—the "fragrantly"[57] illegitimate and illegal denial of CAB approval.

The third element, adjudication of the issue in the former suit, is satisfied by the conspicuous and express holding of the Trial Court on the claims of Due Process and Equal Protection, which was founded on extensive litigation regarding Respondents' official conduct.[58] Additionally, even if the Trial Court Order was limited to state constitutional claims, which it clearly is not, res judicata would bar the City "from raising any issues which might have been raised in the former suit."[59] Under South Carolina law, the City had the burden of

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[55] *Plum Creek Dev. Co.* v. Conway, 334 S.C. 30, 34 (1999); *Hart v. Bates*, 1882 WL 5563 (S.C. 1882).

[56] *Plum Creek Dev. Co.*, 334 S.C. at 34; *Bagwell v. Hinton*, 205 S.C. 377, 32 S.E.2d 147, 156 (1944).

[57] Tr. Ct. Order, App. at 62, 64, 67, 68, 69.

[58] Tr. Ct. Order, App. at 46, 80.

[59] *Plum Creek Dev. Co.*, 334 S.C. at 34, 512 S.E.2d at 109 (*quoting Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)) (emphasis added).

contesting the express holdings of the state trial court in the prior action.

On June 1, 1999, the City's motion to alter or amend the trial court order was denied.[60] The City appealed the order, and the State Court of Appeals affirmed *in toto* with no dissent.[61] The Supreme Court granted a petition for a writ of certiorari, considered the parties' briefs, heard oral argument, and summarily dismissed the writ as improvidently granted on December 19, 2002.[62]

In South Carolina, a final judgment on the merits rendered by a court of competent jurisdiction, without fraud or collusion, is conclusive as to the rights of the parties and their privies, "even [if] the judgment is manifestly wrong in law or fact."[63] Thus, there is no basis for a collateral attack upon the state court judgment, and the litigation of the same facts, circumstances, and rights in this lawsuit would be extremely prejudicial and unfair.[64]

Congress enacted 28 U.S.C. § 1738 to avoid this type of judicial friction between the federal and state courts,[65]

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[60] Respondents' Mot. to Alter or Amend, App. at 227-42 (due process and equal protection holdings not appealed).

[61] S.C. Ct. Appeals, App. at 35-45.

[62] *Boulevard Dev. v. Myrtle Beach*, Mem. Op. No. 2002-MO-079 (filed Dec. 19, 2002), App. 34.

[63] *S.C. Dep't of Soc. Servs. v. Basnight*, 346 S.C. 241, 248 (S.C. Ct. App. 2001); *Quarles v. Miller*, 86 F.3d 55, 57 (4th Cir. Va. 1996) (*citing Carpenter v. Ingram*, 152 Va. 27, 146 S.E. 193, 195 (Va. 1929)).

[64] *See Plum Creek Dev. Co.*, 334 S.C. at 35, 512 S.E.2d at 109.

[65] *In re Genesys Data Tech., Inc.* 204 F.3d 124, 127-28 (4th Cir. 2000) (*quoting Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S. Ct. 1327 (1985).

and the Fourth Circuit lacked the authority to collaterally attack the judgment of the courts of South Carolina.[66]

C. THE FOURTH CIRCUIT ERRED IN ENTERING A DECISION THAT IS IN DIRECT CONFLICT WITH STATE COURT PROCEEDINGS, WHERE THE STATE COURT FOUND COMPETENT PROOF OF AN EQUAL PROTECTION VIOLATION BASED ON THIS COURT'S PRECEDENT

This Court made "clear in *Village of Willowbrook v. Olech,* that a party can bring an equal protection claim by alleging it has 'been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'"[67] Petitioners "need not prove that another fundamental right was trampled – the right to equal protection of the laws is itself fundamental."[68] The unlawful administration of ordinances fair on their face, resulting in unequal application to those who are entitled to be treated alike, is a denial of equal protection where there is shown to be present in it an element of intentional or purposeful discrimination.[69]

The Fourth Circuit Court of Appeals stated Petitioners failed to present evidence that their project

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[66] *See Resolute Ins. Co. v. North Carolina*, 397 F.2d 586 (4th Cir. 1968); *Patterson v. Newport News*, 364 F.2d 816, 818 (4th Cir. 1966); *see also Atkins v. School Bd.*, 379 F. Supp. 1060, 1062 (D. Va. 1974).

[67] *Tri County Paving, Inc. v. Ashe County*, 281 F.3d 430, 438-39 (4th Cir. 2002) (*citing Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 1074 (2000).

[68] *Batra v. Bd. of Regents of Univ. of Neb.*, 79 F.3d 717, 721 (8th Cir. 1996).

[69] *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 401 (1944).

was rejected because it was a high rise, and quoted a decision authored by the Respondent City Council:

> The evidence in the record explaining why the project was rejected was the order of the City Council which rejected the project because of its failure to discourage monotonous, drab or unsightly development, to conserve natural beauty, to give proper attention to exterior appearance, and properly relate to its site.[70]

The Fourth Circuit's reliance upon the City's decision in this opinion is an affront to the prior state court proceedings. The state courts actually reviewed both Orders of the City Council, and the state trial court expressly held that the City's reasoning was "[M]erely a pretense to stop development."[71] In other words, the state courts found that the hearings were a predetermined sham, and as a result there is competent proof that the City intentionally targeted Petitioners' project.

Without any explanation, the Fourth Circuit also overlooked the numerous findings of fact of the state trial court in regard to Petitioners being similarly situated and the subject of purposeful discrimination. As to being similarly situated, the trial court order clearly states that Petitioner: was similarly situated with property in the neighboring area and the entire city, produced an expert with knowledge of discrimination, and was singled out and required to do more than any other permitee.[72]

On the issue of purposeful discrimination, the state trial court order expressly found that Petitioners were

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[70] Fourth Circuit Opinion, App. 10.

[71] Tr. Ct. Order, App. 80; *See also* text accomp. notes 46, 57, 58.

[72] *See* Br. of Appellants', App. 151-53.

intentionally targeted, the subject of illegitimate and illegal action, and their property was effectively re-zoned.[73]

The Circuit Court of Appeals erred in finding the City simply had "mistakenly treated an individual differently."[74] If the City had made a simple mistake, the South Carolina Court of Appeals would not have agreed "with the trial judge that a remand for another hearing before the CAB or City Council would be futile."[75]

Even if this Court were to hold that res judicata does not apply despite the express holding of the Trial Court, findings of fact as to issues actually litigated are evidence which must be viewed in the light most favorable to Petitioners as the non-moving party, as well as the law of the case which the City is collaterally estopped from contesting in the federal courts.

Petitioners' were similarly situated to other developers, and subjected to purposeful and intentional discrimination, and therefore have fairly stated a violation of equal protection under this Court's precedent as set forth in *Village of Willowbrook v. Olech*. The Fourth Circuit erred in dismissing Petitioners' claim at summary judgment.

CONCLUSION

This petition is not an attack on the amount of deference federal courts give to local governments or the system of zoning. Nevertheless, the law as interpreted

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[73] *See* Br. of Appellants', App. 154-55.

[74] Fourth Circuit Opinion (*citing Sylvia Dev.*, 48 F.3d at 825), App. 10.

[75] S.C. Court of Appeals, App. 45.

and applied by the Fourth Circuit goes too far, and the facts of this case present this Court with the opportunity to make it right. While every alleged arbitrary and capricious action does not constitute a violation of Due Process, some might, and therefore these claims must actually be analyzed appropriately.

Petitioners respectfully pray this Court will grant the petition for certiorari to consider whether abusive and oppressive governmental behavior is relevant.

Respectfully submitted,

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APPENDIX

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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUNRISE CORPORATION OF MYRTLE BEACH;
BOULEVARD DEVELOPMENT LLC;
S&H DEVELOPMENT, INC.,
Plaintiffs-Appellants,

v. No. 04-2171

THE CITY OF MYRTLE BEACH;
MARK MCBRIDE, Individually;
JUDY RODMAN, Individually;
RACHAEL BROADHURST, Individually;
CHARLES MARTINO, Individually;
WILSON CAIN, Individually;
CRAIN WOODS, Individually;
LARRY BRAGG, Individually;
TOM CONN, Individually;
TOM DAVIS, Individually;
SALLY HOWARD, Individually;
FRED ROURK, Individually,
Defendants-Appellees.

Appeal from the United States District Court
for the District of South Carolina, at Florence.
C. Weston Houck, Senior District Judge.
(CA-99-132-12)

Argued: May 25, 2005
Decided: August 26, 2005
[ENTERED: August 26, 2005]

Before WIDENER, WILKINSON, and NIEMEYER, Circuit Judges.

Affirmed by published opinion. Judge Widener wrote the opinion, in which Judge Wilkinson and Judge Niemeyer concurred.

COUNSEL

ARGUED: Howell V. Bellamy, Jr., BELLAMY, RUTENBERG, COPELAND, EPPS, GRAVELY & BOWERS, P.A., Myrtle Beach, South Carolina, for Appellants. Frances Isaac Cantwell, REGAN & CANTWELL, Charleston, South Carolina, for Appellees. **ON BRIEF:** Douglas M. Zayicek, BELLAMY, RUTENBERG, COPE-LAND, EPPS, GRAVELY & BOWERS, P.A., Myrtle Beach, South Carolina, for Appellants. William B. Regan, REGAN & CANT-WELL, Charleston, South Carolina; L. Gregory Cook Horton, Adriane Malanos Belton, BUIST, MOORE, SMYTHE & MCGEE, P.A., Charleston, South Carolina, for Appellees.

OPINION

WIDENER, Circuit Judge:

Plaintiffs, Sunrise Corporation of Myrtle Beach, Boulevard Development LLC, and S&H Development, Inc. (collectively Sunrise),[1] appeal from the district

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[1] The district court dismissed plaintiffs Sunrise Corporation and S&H Development, Inc. for lack of prudential standing, which is one of the issues plaintiffs argue on this appeal. Under *Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc.*, 840 F.2d 236, 239 (4th Cir. 1988)(citing *Bell v. Hood*, 327 U.S. 678, 682 (1946)), when the contested basis for jurisdiction is also an element of the plaintiffs federal claim, the claim should not be dismissed for lack of jurisdiction. The contested basis for jurisdiction in this case is whether there was an injury in fact, which is also an element of their federal claim. Accordingly we find that the district court erred in dismissing Sunrise and S&H for lack of prudential standing, and should have addressed the objection as an attack on the merits, as do we. *Rivana*, 840 F.2d at 239.

court's granting of defendant the City of Myrtle Beach's (Myrtle Beach) motions for summary judgment.[2] underlying case Sunrise was seeking damages for violations of the Due Process, Equal Protection and Takings Clauses of the Constitution under 42 U.S.C. § 1983, attorney's fees under 42 U.S.C. § 1988, and inverse condemnation. Finding that Sunrise is not entitled to any remedy, we affirm.

I.

In 1996, shortly after all three plaintiffs were formed, plaintiffs purchased the St. John Inn and surrounding land, an 88-unit hotel and restaurant located on 2.65 acres in the City of Myrtle Beach, looking to further development. Sunrise then examined the zoning regulations, decided on a proposal for a 14-story tower with 98-units, obtained financing, entered negotiations with a builder, and began to execute contracts to pre-sell individual units in the new tower.

Myrtle Beach's esthetic zoning laws require that every new construction requires approval of the Community Appearance Board before a building permit would issue, even if the plans complied with all zoning regulations. Myrtle Beach Code Appx. A § 603.1. Under this law, the Board is to consider preservation of the landscape; relation of the proposed buildings to the environment; drives, parking, and circulation; surface water drainage; utility service; advertising features; special features; and application of design standards. Myrtle Beach Code Appx. A § 604. If the Board denies the proposal, the applicant can appeal to the City Council, Myrtle Beach Code Appx. A § 606, which reviews the proposal *de novo*. Myrtle Beach Code Appx. A § 606.2. If the City Council affirms the Board,

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[2] There were a number of individual defendants in the case below, Sunrise, however, has abandoned the claims against the individual defendants.

the applicant has the right to appeal to the Circuit Court in and for Horry County.[3] Myrtle Beach Code Appx. A § 606.2.

In mid 1998, Sunrise applied for a permit to build the new hotel. They then submitted to the Board a proposal that complied with all of the zoning ordinances. The Board suggested changes to the proposal and later held a second hearing. This hearing was attended by residents of the area who voiced opposition to Sunrise's proposal. After the hearing, the Board denied the proposal, citing section 604 of the City Code. Sunrise then appealed the Board's decision to the City Council and was granted a hearing where area residents again voiced opposition to the proposal. Five days later the City Council denied the proposal because of its view that the proposal violated sections 601 and 604 of the City Code. Plaintiffs then appealed the decision of the City Council to the Circuit Court.

While the appeal of the City Council's decision was still pending, plaintiffs brought the instant action in the Court of Common Pleas of Horry County, a state court, seeking to recover their pre-development costs as well as lost profits from the pre-sale of units in the proposed tower. The complaint asserted causes of action against the City Council as well as several individual members of the Board. The complaint sought damages under 42 U.S.C. § 1983 for violations of the Due Process, Equal Protection, and Takings Clauses; 42 U.S.C. § 1988 for attorney's fees; and inverse condemnation under South Carolina state law. The defendants then removed the case to federal district court. The parties agreed to stay this action until the resolution of the state court appeal of the City Council's denial of plaintiffs' proposal.

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[3] The Circuit Court may be referred to as the Court of Common Pleas. They are the same court.

On May 13, 1999, the Court of Common Pleas issued an order reversing the decision of the City Council withholding the permit, finding that Myrtle Beach's decision violated the holding *of Peterson Outdoor Advertising v. City of Myrtle Beach*, 489 S.E.2d 630 (S.C. 1997)(Board's denial of proposal must be based on application of the City Code to the facts of the case), because it was arbitrary, subjective, without evidentiary support, an abuse of discretion, and a denial of plaintiffs' due process and equal protection rights. The court then determined that re-application would be futile and ordered Myrtle Beach to issue the permit to Sunrise. At some point in 1999, plaintiffs sold the site for approximately four million dollars.

Myrtle Beach appealed the Court of Common Pleas' decision to the South Carolina Court of Appeals, which affirmed in 2001. An appeal was then taken by Myrtle Beach to the Supreme Court of South Carolina, which initially granted certiorari, but later dismissed the writ as improvidently granted. At that point defendants made the permit available to plaintiffs.

After the Supreme Court of South Carolina dismissed the writ of certiorari, the district court lifted its stay in this case, and both parties later filed motions for summary judgment. At the hearing on the motions, the district court denied plaintiffs' motion for summary judgment which contended that the South Carolina Court of Appeals decision was res judicata of their § 1983 due process and equal protection claims, as well as granted defendants' motion for summary judgment on those same claims. The district court also reserved ruling on the rest of defendants' motion. Plaintiffs then filed a motion for reconsideration. The district court held a hearing on that motion, after which it improvidently dismissed two of the plaintiffs for lack of prudential standing[4] denied plaintiffs' motion for reconsideration,

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[4] See n.1, supra.

and granted the defendants' motion for summary judgment as to the takings and inverse condemnation claims.

II.

On appeal, plaintiffs advance five arguments as to how the district court allegedly erred. First plaintiffs assert that the district court erred by holding that Myrtle Beach was not barred by res judicata from arguing that it had not violated plaintiffs' due process, equal protection and Fifth Amendment rights. Second, plaintiffs argue that the district court erred in holding that Sunrise Development and .S&H Development, Inc. did not have prudential standing.[5] Third plaintiffs assert that the district court erred in dismissing their due process claims and argue the Board's actions were illegitimate under the guise of the esthetic ordinance. Fourth, plaintiffs argue that the district court erred by dismissing their Equal Protection claim because they failed to present evidence as to being similarly situated and the victim of illegitimate discretion. Lastly, plaintiffs assert that the district court erred in dismissing their takings and inverse condemnation claims by holding that their intended use of the property was not an antecedent property right and that the delay was caused by the time required to get judicial review.

We review *de novo* a district court's grant of summary judgment. *Temkin v. Fredrick County Comm'rs*, 945 F.2d 716, 718 (4th Cir. 1991). Summary judgment under Rule 56(c) is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

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[5] See n.1, supra.

that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 247 (1986).

III.

Plaintiffs assert that the district court erred by not applying the doctrine of res judicata to bar Myrtle Beach from arguing that its actions did not violate their Constitutional rights. The judgment they argue should be given res judicata effect is the decision of the Common Pleas Court which stated that Myrtle Beach's actions were "arbitrary, subjective, without evidentiary support, an abuse of discretion, merely a pretense to stop development, and a denial of Plaintiffs' due process and equal protection rights."

Under 28 U.S.C. § 1738, federal courts must give full faith and credit to state court judgments. This includes the application of state preclusion rules to determine whether a prior state court judgment has res judicata effect in a § 1983 action. *Dionne v. Mayor and City Council of Baltimore*, 40 F.3d 677, 682 (4th Cir. 1994). Under South Carolina law, to establish res judicata a party must show "(1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." *Plum Creek Dev. Co., Inc. v. City of Conway*, 512 S.E.2d 106, 109 (S.C. 1999).

Even if we consider the requirement of identity of the subject matter to be satisfied, which is not at all certain, the federal Constitutional rights of due process and equal protection were, not adjudicated in the South Carolina Court of Appeals.[6] That proceeding was nothing other than a court review of an administrative determination by local zoning authority. That court summarized its decision as follows: "We conclude the decision of City Council was arbitrary because it was based, not on the evidence in the record and

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[6] We apply that decision, not the decision of the Court of Common Pleas.

the esthetic concerns of the CAB's ordinance, but upon the objections of citizens of the neighborhood who wanted to stop further development in the area." JA 425. This decision is an indication of a mistake by the local zoning authorities and hardly conclusive evidence, even if evidence at all, of a violation of due process and equal protection rights. It is no indication that such federal Constitutional rights were decided in the decision of the South Carolina Court of Appeals, and we so hold.

IV.

Plaintiffs next assert that the district court erred in dismissing their due process claims. To establish a violation of procedural due process, plaintiffs must show that (1) they had property or a property interest (2) of which the defendant deprived them (3) without due process of law. *Sylvia Dev. Corp. v. Calvert County, Md.*, 48 F.3d 810, 826 (4th Cir. 1995). To establish a violation of substantive due process, plaintiffs must "demonstrate (1) that they had property or a property interest; (2) that the state deprived them of this property or property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental authority that no process could cure the deficiency." *Sylvia Dev. Corp.*, 48 F.3d at 827 (citing *Love v. Pepersack*, 47 F.3d 120, 122 (4th Cir. 1995))(emphasis in original).

We are of opinion that plaintiffs received due process, both procedural and substantive. Plaintiffs claim that their due process rights were violated because the hearings they received were unfair. Even if true, which we do not decide, this does not change the fact that plaintiffs received four levels of review, in each of which they were permitted to present their side of the controversy.[7] In cases such as

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[7] The decision by the Board was reviewed by the City Council, then the Court of Common Pleas, then the South Carolina Court of Appeals, and finally the South Carolina Supreme Court.

this we review the state process as a whole, and do not look only to what happened in front of the Board. See e.g. *Tri County Paving, Inc. v. Ashe County*, 281 F.3d 430, 437 (4th Cir. 2002)(a "due process violation actionable under § 1983 is not complete when the deprivation occurs; it is only complete if and when the State fails to provide due process")(quoting *Fields v. Durham*, 909 F.2d 94, 98 (4th Cir. 1990)). While it is true that there were several levels of judicial and administrative review, plaintiffs received the very remedy they sought, the permit to develop the property. Indeed, the very extent of review is an indication of the existence of procedural due process, rather than its absence. Costs incurred securing a permit are part of the process, and we have never held them to be compensable. Plaintiffs also assert that the state court's determination of arbitrariness entitles them to damages under § 1983. But we have made it clear that a violation of state law is not tantamount to a violation of a federal right, *Sylvia Dev. Corp.*, 48 F.3d at 829.[8]

Accordingly, we find that the district court did not err in dismissing plaintiffs' due process claims.

V.

Plaintiffs next assert that the district court erred by dismissing their equal protection claim by holding that they failed to present evidence as to being similarly situated and the victim of illegitimate discretion. Sunrise bases this argument on *Tri County Paving*, where we said that a party can bring an equal protection claim by alleging that it had been intentionally treated differently from others similarly

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[8] Our reasoning in *Sylvia* applies here, and we apply it: "The fact that established state procedures were available to address and correct illegal actions by the Board belie the existence of a substantive due process claim." *Sylvia*, 48 F.3d at 829.

situated and that there was no rational basis to support the different treatment. 281 F.3d at 439 (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). Plaintiffs essentially argue that because their high rise building was denied while other high rises were approved, a case for violation of equal protection exists. Under our rule in *Sylvia Dev. Corp.* to support this claim, plaintiffs had to show that the classification, that of a high rise, was the basis of Myrtle Beach's decision, and that this fact prompted Myrtle Beach to engage in intentional, purposeful discrimination. 48 F.3d at 820. While plaintiffs did present evidence that there were other high rises in Myrtle Beach, they failed to present evidence that their project was rejected because it was a high rise. The evidence in the record explaining why the project was rejected was the order of the City Council which rejected the project because of its failure to discourage monotonous, drab or unsightly development, to conserve natural beauty, to give proper attention to exterior appearance, and properly relate to its site.

Even if we were to determine that plaintiffs' project was similarly situated to other projects, they would still need to show purposeful discrimination. If disparate treatment alone was sufficient to support a Constitutional remedy then every mistake of a local zoning board in which the board mistakenly treated an individual differently from another similarly situated applicant would rise to the level of a federal Constitutional claim. *Sylvia Dev. Corp.* 48 F.3d at 825 (citing *Snow-den v. Hughes*, 321 U.S. 1, 11-12 (1994)). There is no evidence in the record that Sunrise was subjected to purposeful, invidious discrimination. At most the evidence shows that the public was opposed to the project for a number of reasons, some relevant to Board review and some not. This evidence that the Board and City Council responded to the public opposition does not rise to the level of a Constitutional violation, because we

have recognized that matters of zoning are inherently political, and that it is a zoning official's responsibility to mediate disputes between developers, and local residents. *Sylvia Dev. Corp.* 48 F.3d at 828.

Similar to the plaintiffs in *Sylvia Dev. Corp.*, the plaintiffs here at most could prove that similarly situated developers were treated differently, without an adequate evidentiary basis for the differing treatment. Even if this is good grounds for an appeal under state law, it does not give rise to a claim for a violation of equal protection. *Sylvia Dev. Corp.*, 48 F.3d at 825. Accordingly, we are of opinion that the district court did not err in dismissing plaintiffs' equal protection claim.

VI.

Plaintiffs' final argument is that the district court erred in dismissing their takings and inverse condemnation claims by holding that the lawful use of property was not an antecedent property right, and that the delay was only an unfortunate by-product of the adjudicatory system. Under South Carolina law federal takings law is incorporated as an element of an inverse condemnation action. *Sea Cabins on the Ocean IV Homeowners Association, Inc. v. City of North Myrtle Beach*, 548 S.E.2d 595, 601 (S.C. 2001). Accordingly these two issues are both resolved by a finding that the City's actions here did not constitute a taking under federal law. There are two distinct types of taking under federal law, categorical and regulatory.[9] Because Myrtle Beach in this case neither physically took possession of any part of the property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), nor denied plaintiffs all economically viable

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[9] The South Carolina court in *Sea Cabins* refers to the same as physical and regulatory. 548 S.E.2d at 601.

use[10], *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992), this case would not be a categorical taking.

A regulatory taking occurs when a regulation or limitation on land use interferes with a landowner's rights but does not deprive the land of all economically viable use. See generally *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). The analysis in a takings case necessarily begins with determining whether the government's action actually interfered with the landowner's antecedent bundle of rights. *See Lucus*, 505 U.S. at 1027 (discussing how property rights are a "bundle of rights"). If, as the district court found, there was no interference with this bundle of rights, there is no taking.

Plaintiffs contend that there was interference with their antecedent property rights because their proposal complied with all of the zoning ordinances in force at the time, and thus they were entitled to the permit. But the plaintiffs ignore the fact that under the applicable law they were required to not only comply with the zoning ordinances, but also to secure Board approval under Myrtle Beach Code Appx. A § 603.1. Myrtle Beach Code Appx. A § 603.1 is as certainly a part of the City's zoning law as any other land use ordinance. Accordingly, they had no right to proceed with the project until they received the Board's approval.

As a general rule, a delay in obtaining a building permit is not a taking but a non-compensable incident of ownership. *Agins v. City of Tiburon*, 447 U.S. 255, 263 n. 9 (1980)("Mere fluctuations in value during the

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[10] The City did not deny plaintiffs all economically viable use because the original inn and restaurant remained open while this case was pending. Nor were the plaintiffs deprived of any use they sought which conformed with the City zoning laws. The sought-for permit issued.

process of governmental decision making, absent extraordinary delay, are 'incidents of ownership'"). Plaintiffs contend that this case is an example of the extraordinary delay referred to in *Agins*.

But the delay at issue in this case was not extraordinary. Plaintiffs first applied for Board approval in August of 1998. By that November they had been through the entire process twice. At no point did defendants take more than 15 days to issue their final decisions. The bulk of the delay that plaintiffs claim was extraordinary was a result of the process to appeal the defendants' decision. There is nothing in the record to suggest that defendants had any control over how quickly the case moved under state law through the various judicial appeals processes, or that the defendants acted in bad faith or engaged in deliberate delay during that process. Accordingly, any delay was nothing more than the law's delay as lamented for some 400 years, and not an extraordinary delay that could give rise to Constitutional implications.

The judgment of the district court is accordingly

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Sunrise Corporation of Myrtle Beach, Boulevard Development, L.L.C., and S&H Development,	)	
Plaintiffs,	)	Civil Action No. 4:99-132-12
vs.	)	
The City of Myrtle Beach, and Mark McBride, Judy Rodman, Rachael Broadhurst, Charles Martino, Wilson Cain, and Crain Woods, individually,	)	**ORDER**
Defendants.	)	

[ENTERED: August 10, 2004]

This matter is before the Court on (1) the plaintiffs' motion to reconsider the Court's oral order of September 4, 2003 granting partial summary judgment to the defendants and (2) the balance of the defendants' motion for summary judgment. For the reasons that follow, the Court (1) dismisses S&H and Sunrise, (2) denies the motion to reconsider, and (3) grants the motion for summary judgment.

I. Facts and Procedural History

In 1996, Ronnie Sorrells, Marilu Sorrells, and Bruce Helm formed the plaintiffs, S&H Development Corporation ("S&H"), Sunrise Corporation ("Sunrise"), and Boulevard Development, LLC ("Boulevard"). Later that year, S&H purchased the St. John's Inn ("Inn") and surrounding land ("Site") for approximately $3.1 Million Dollars with the intent of further developing the site. The

Inn is an 88-unit, three-(or four-)story hotel and restaurant located on 2.65 acres in the City of Myrtle Beach ("City"). S&H later leased the right to operate the Inn and restaurant to Sunrise and assigned the right to develop the site to Boulevard. Boulevard set out to develop a 98-urrit 14-story tower on the property. After examining pertinent zoning regulations, deciding on a proposal, obtaining financing, and entering negotiations with a builder, Boulevard executed contracts to pre-sell individual condominium units in the new tower.

The City Code provided that every new construction, even if it complied with all zoning regulations, required approval of the Community Appearance Board ("CAB") before the City would issue a building permit. In essence, the CAB's purpose was to ensure that new construction in the City was aesthetically pleasing. See Myrtle Beach Code Appx. A § 601.2. Under the City Code, the CAB was to be guided by certain considerations, such as preservation of the landscape; relation of proposed buildings to the environment; drives, parking and circulation; surface water drainage; utility service; advertising features; special features; and application of design standards. See id. § 604. If the CAB denied a construction proposal, the applicant had the right to appeal to the City Council. See id. § 606. On appeal, the City Council sat as the CAB and reviewed the proposal de novo. See id. § 606.2. If the City Council affirmed, the applicant had the right to appeal to the Court of Common Pleas for Horry County ("Circuit Court"). See id. § 606.2.

In mid-1998, Boulevard applied for a permit to build the new tower. On August 6, 1998, the plaintiffs, denominated as the "St. John's Inn," submitted a proposal to the CAB that complied with the City's zoning ordinances. The CAB suggested several changes to the proposal and held a second hearing on the matter on August 20, 1998. Area residents attended the hearing and voiced opposition to the proposal. The CAB denied

the proposal, citing various provisions from section 604 of the City Code. Boulevard appealed to the City Council and was granted a hearing on September 3, 1998. Area residents attended this hearing and again voiced opposition to the proposal. On September 8,1998, the City Council denied the proposal, ostensibly because it was of the view that the proposal violated Code sections 601 and 604.[1] As allowed by the City Code, the plaintiffs appealed the denial to the Circuit Court. See City Code § 607.

On December 17,1998, the plaintiffs brought this action in state court, seeking to recover their pre-development costs and lost profits from the pre-sale of the units in the proposed tower. The complaint asserts causes of action against the City Council and several individual members of the CAB under (1) 42 U.S.C. § 1983 based on the Due Process, Equal Protection, and Takings Clauses, (2) 42 U.S.C. § 1988 for attorney's fees, and (3) inverse condemnation.[2] On January 15, 1999, the defendants removed the case to this Court. The parties later agreed to stay this action pending resolution of the plaintiffs' appeal of the defendants' permit denial in the state courts.

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[1] On October 1, 1998, Boulevard reapplied to the CAB, this time presenting the same proposal as it had earlier made to the City Council. The CAB again denied the application and Boulevard again appealed to the City Council. On November 10, 1998, the City Council conducted a second hearing, and on November 25, 1998, denied the application.

[2] The complaint also states causes of action for (1) arbitrary decisionmaking and (2) violation of due process under the South Carolina Constitution. The plaintiffs, however, explicitly abandoned these claims. See Hearing Transcript at 40 (in response to questioning from the Court regarding remedies that the plaintiffs would have in the event the Court granted the defendants' motion for summary judgment on the federal claims, the plaintiffs stated "[t]here is no claim for monetary relief under state law for due process" and "[t]he only cause of action that would be left would be an inverse condemnation cause of action").

On May 13, 1999, the Circuit Court issued an order reversing the City Council's actions in withholding the permit. That court found that the City's decision violated the holding of Peterson Outdoor Advertising v. City of Myrtle Beach, 327 S.C. 230, 233 (1997) (CAB disapproval must be based on application of City Code to facts of the case) because the permit denial was arbitrary, capricious, and without evidentiary support in the record. In particular, it found that the City denied the permit not because of the legitimate aesthetic concerns announced in sections 601 and 604, but rather because the community did not want another high-rise complex in the area. The Court also found that re-application would be futile and ordered that the City issue the permit. At some point later that year, the plaintiffs sold the site for approximately $4 Million Dollars.

The City appealed the Circuit Court's decision to the South Carolina Court of Appeals. On February 13, 2001, the Court of Appeals affirmed. The City again appealed, this time to the Supreme Court of South Carolina. The Supreme Court granted certiorari, but, on December 19, 2002, dismissed the writ as improvidently granted. At that time, the defendants made the permit available to Boulevard.

This Court lifted the stay in this case on May 22, 2003. On September 4, 2003, the matter came before the Court on the parties' cross motions for summary judgment. At that hearing, the Court, by oral order, (1) denied the plaintiffs' motion for summary judgment, which contended that the Court of Appeals' decision was res iudicata to their section 1983 due process and equal protection claims, and (2) granted the defendants' motion for summary judgment as to those same claims. The Court reserved ruling on the balance of the defendants'

motion.[3] On September 16, 2003, the plaintiff filed a motion for reconsideration of the Court's September 4, 2003 order. On September 26, 2003, the Court conducted a hearing on the motion to reconsider and took the motion under advisement. The parties requested, and the Court allowed, additional briefing. That briefing is now complete and the motions are ripe for decision.

Before addressing the motions, however, the Court first addresses whether S&H and Sunrise have standing to pursue this suit.

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[3] At that hearing, the Court also dismissed the plaintiffs' takings claim. The Court found that the claim was not ripe due to the fact that no court had yet heard the plaintiffs' inverse condemnation claim. See Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985) ("[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."); Henry v. The Jefferson County Planning Commission, 34 Fed.Appx. 92, 96 (4th Cir. 2002) (unpublished) ("[T]he mere taking of a landowner's property does not violate the Fifth Amendment; the violation occurs only when the property is taken and the landowner has been denied just compensation.") (emphasis in original); Sea Cabin on the Ocean IV Homeowners Association, Inc. v. City of Myrtle Beach, 828 F.Supp. 1241, 1250-51 (D.S.C. 1993). The Court did not rule on the plaintiffs' inverse condemnation claim at that time because it intended to dismiss it by written order under 28 U.S.C. § 1367(c)(3).

The parties later requested that the Court exercise jurisdiction over the plaintiffs' inverse condemnation claim. Pursuant to that request, the Court examined the claim and became aware that it likely presented a federal question under Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 809 (1986), because it incorporates federal takings law as a necessary element, see Sea Cabins on the Ocean IV Homeowners Association, Inc. v. City of North Myrtle Beach, 548 S.E.2d 595, 600 (S.C. 2001). The Court therefore amends its oral order of September 4, 2003 by vacating that portion of the order finding the plaintiffs' takings claim unripe. The Court will address the takings claim in Part III of this order.

II. Standing[4]

Modem standing doctrine has two components – Article III standing and prudential standing – both of which generally must be met in order for a plaintiff to pursue a suit. See Bennet v. Spear, 520 U.S. 154, 163 (1997) (noting that Congress can abrogate requirements of prudential standing with a clear statement); Gladstone. Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979); Maryland Highways Contractors Association. Inc. v. State of Maryland, 933 F.2d 1246, 1252-53 (4th Cir. 1991) (applying prudential standing limitations to section 1983). To have Article III standing, a plaintiff must have: (1) suffered an injury-in-fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the defendant's challenged action; and (3) it is likely, as opposed to merely speculative, the injury will be redressed by a favorable decision. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). To have prudential standing, the putative plaintiff must not seek to recover for injuries to a third party, but rather seek to redress his own harm. See Gladstone, 441 U.S. at 100.

Boulevard, as assignee of the rights to develop the site, alone applied for the building permit, which application the defendants denied. There is no doubt but that Boulevard itself suffered injury, that the defendants' actions caused the injury, and that the injury could be redressed by an award of damages to Boulevard. S&H and Sunrise, however, as owner of the site (but not the

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[4] The Court did not address standing at the September 4, 2003 hearing because of the practical considerations that (1) at least one of the plaintiffs had standing and (2) the Court granted summary judgment to the defendants, thereby disposing of the federal aspects of the case. After reviewing the standing issue anew, the Court now prefers to address it.

right to develop it) and lessee of the Inn's operations, respectively, did not apply for a permit. Their injuries, lost profits from the sale of condos in the new tower (S&H) and reduced bookings in anticipation of the construction of the new tower (Sunrise), stemmed from, the defendant's denial of Boulevard's permit application, not out of the defendants' interference with their own rights. Cf. Southern Blasting Services, Inc. v. Wilkes County North Carolina, 288 F.3d 584, 595 (4th Cir. 2002) (finding no injury sufficient to challenge permitting statute where plaintiffs never applied for a permit). The Court therefore finds that S&H and Sunrise do not have prudential standing to pursue this suit.[5]

III. Motion to Reconsider - Federal Due Process and Equal Protection

On September 4, 2003, the Court granted the defendants' motion for summary judgment as to the plaintiffs' section 1983 due process and equal protection claims. The Court found that (1) the plaintiffs' due process claims failed because they did not have a property right to build the new development and (2) the plaintiffs' equal protection claim failed because (a) the plaintiffs had not produced any evidence that those similarly

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[5] In arguing that S&H and Sunrise have standing, the plaintiffs (1) note that in all the appeals before the City Council and the state courts were brought on behalf of "Boulevard and St. John's Inn" and (2) contend that "St. John's Inn" is, in fact, S&H and Sunrise. Even assuming that "St. John's Inn" is S&H and Sunrise, the Court rejects the argument that S&H and Sunrise acquired standing simply" by joining Boulevard in its administrative appeal of the defendants' denial of Boulevard's permit application. The City Code provides that "[a]ny person who may have a substantial interest in any decision of the city council related to an appeal from a decision of the [CAB] may appeal from the council's [permit denial]." The plaintiffs have made no serious attempt to show that merely having a "substantial interest" under state law confers the right to sue in federal court.

situated were treated differently and (b) the defendants acted pursuant to a legitimate governmental interest.

The plaintiffs have asked the Court to reconsider these rulings under Rule 59(e).[6] The Fourth Circuit has recognized three grounds for a Court to grant a Rule 59(e) motion: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. See Pacific Insurance Co. v. American National Fire Insurance Co., 148 F.3d 396, 402 (4th Cir. 1998); EEOC v. Lockheed Martin Corp., 116 F.3d 110, 112 (4th Cir. 1997); Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). The plaintiffs argue that in granting summary judgment to the defendants the Court committed a clear error of law. The Court disagrees.

A. Due Process

Boulevard alleges that the defendants violated its procedural and substantive due process rights by arbitrarily denying the building permit. To establish a violation of the procedural Due Process Clause, Boulevard must show: (1) it had a property right and (2) the defendants denied that right (3) without due process of law. See Sylvia Development Corp v. Calvert County, Maryland, 48 F.3d 810, 826 (4th Cir. 1995). To establish a violation of the substantive Due Process Clause, Boulevard must show: (1) it had a property right; (2) the defendants denied that right and (3) the governmental action falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency. See id. at 827. Boulevard's due process claims

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[6] In their motion for reconsideration, the plaintiffs renew their argument that the state court decisions are *res judicata* to their federal claims. The Court has reviewed the record and again concludes the state decisions tamed on the application of state, not federal, law.

fail because it did not have a property right in permit issuance.

The Due Process Clause protects property rights created by state law. See id. at 826. To establish that the defendants violated the Due Process Clause, then, Boulevard must make the threshold showing that it had a state-created right to the permit. In the Fourth Circuit, a plaintiff has a property right in a building permit only if "he has a legitimate claim of entitlement to it." See Gardner v. City of Baltimore Mayor and City Council, 969 F.2d 63, 68 (4th Cir. 1992) (quotations omitted). A plaintiff has a legitimate claim of entitlement to a permit if, "under state and municipal law, the permitting authority lacks [any significant] discretion to deny issuance of the permit or to withhold its approval." Id. See also id. at 69 (using term "significant" to modify term "discretion"); Biser v. Town of Bel Air, 991 F.2d 100, 104 (4th Cir. 1993) (plaintiff has no claim of entitlement when "local agency has any significant discretion in determining whether a permit should issue"), citing Gardner, 969 F.2d at 68. Cf. Sylvia Development, 4S F.3d at 826 (plaintiff has no claim of entitlement because licencing agency has "discretion" and "must exercise judgment"). "Under this standard, a cognizable property interest exists only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured." Gardner. 969 F.2d at 68. See also Scott v. Greenville County, 716 F.2d 1409, 1418 (4th Cir. 1983) (applicant enjoyed a cognizable property interest where application complied with state law as it existed at the time of the application).

The focus of the Court's inquiry into whether a plaintiff has a state-created entitlement to the permit is always on the issuing agency's discretion; "the standard focuses on the amount of discretion accorded the issuing agency by law, not on whether or to what degree that discretion is actually exercised." See Gardner, 969 F.2d at

68. In other words, it is immaterial whether the licensing agency abused its discretion in denying the permit. Rather, the touchstone of the due process inquiry is whether the agency possessed significant discretion in the first instance. Moreover, and for the same reason, "a court order requiring [a local agency] to approve [an application for a permit] does not mean that the applicant had a preexisting legal right to that approval." Sylvia Development, 48 F.3d at 827, citing Biser, 991 F.2d at 105. "The [mere] fact that the permit could have been denied on nonarbitrary grounds defeats the federal due process claim." Id. (emphasis added).

The ordinances at issue here, section 604 (standards) and 601 (considerations), give the City Council significant discretion to decide whether to issue a permit. A snippet of section 604 reads:

> The following standards shall be utilized by the board in reviewing the plans, drawings, sketches and other documents [submitted]. These standards are intended to provide a frame of reference for the applicant in the development of site and building plans as well as a method of review for the board. These standards shall not be regarded as inflexible requirements. They are not intended to discourage creativity, invention, or innovation.
> ...
>
> 604.1.1 *Preservation of landscape.* The landscape shall be preserved in its natural state, in so far as practicable, by minimizing tree and soil removal, and any grade changes shall be in keeping with the general appearance of the neighboring developed areas.
>
> 604.1.2 *Relation of proposed buildings to environment.* Proposed structures shall be

> related harmoniously to the terrain and to existing buildings in the vicinity that have a visual relationship to the proposed buildings. The achievement of such relationship may include the enclosure of space in conjunction with other existing buildings or other proposed buildings and the creation of focal points with respect to avenues of approach, terrain features, or other buildings. ...
>
> 604.1.7 *Special features.* Exposed storage areas, exposed machinery installations, service areas, truck loading areas, utility buildings, and structures and similar accessory areas and structures shall be subject to such setbacks, screen plantings, or other screening methods as shall reasonably be required to prevent their being incongruous with the existing or contemplated environment and the surrounding properties.

In addition to section 604, the CAB was "to be guided by the objectives of section 601." Myrtle Beach Code Appx. A § 604.2. A representative sample of section 601 provides:

> [T]he purposes and objectives of site development requirements and site design review procedures are to:
>
> (a) Encourage originality, flexibility, and innovation in site planning and development, including the architecture, landscaping and graphic design of said development;
>
> (b) Discourage monotonous, drab, unsightly, dreary and inharmonious developments; ...

> (d) Protect and enhance the city's appeal to residents, tourists, and visitors and thus support and stimulate business and industry and promote the desireability of investment and occupancy in business, commercial and industrial properties; [and] ...
>
> (g) Foster civic pride and community spirit so as to improve the quality and quantity of government and in growth, change, and improvement[.]"

As was the case in Gardner, Biser, and Sylvia, these provisions of the City code vest significant discretion in the CAB to approve or reject proposals.[7] Moreover, the fact that the City abused its discretion under state law in denying the permit and was ordered to issue one is immaterial to the question of whether the regulations created a pre-existing property interest under the Due Process Clause. See Gardner, 969 F.2d at 68; Biser, 991 F.2d at 105; Sylvia Development, 48 F.3d at 827.[8] Boulevard did not, therefore, have a legitimate claim of entitlement to the permit it sought, and the Court did not

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· Boulevard's attempts to distinguish these cases are unavailing. First, its argument that these cases involved zoning exemptions instead of permit issuance is distinction without difference. Second, its argument that it had a property right because it informed the defendants it would do whatever it took to obtain a permit does not in any way affect the defendants' discretion under the City Code.

· Boulevard argues that because defendants actually abused their discretion under state law it did have a property right for due process purposes. This may (or may not) be the law in other circuits, see DeBlasio v. Zoning Board of Adjustment, 53 F.3d 592 (3d Cir. 1995), but it assuredly is not the law here. And for good reason; such a holding would make federal courts super-zoning boards every time a licensing agency denied a permit on aesthetic grounds.

err in granting summary judgment to the defendants on Boulevard's due process claims.[8]

B. Equal Protection

Boulevard argues that the defendants intentionally treated it differently from other developers because of the anti-developmental animus in the immediate community surrounding the site and that this was not a rational basis for different treatment. Its claim thus purports to come under the equal protection holding of Village of Willowbrook v. Olech, 528 U.S. 562 (2000), where the Supreme Court found that a plaintiff could prevail as a "class of one" if it could show that (1) the government treated it differently from others similarly situated and (2) there was no rational basis for the difference in treatment. Id. at 564; See also Tri-County Paving v. Ashe County, 281 F.3d 430, 439 (4th Cir. 2002).

Like Boulevard's due process claims, the equal protection claim also fails. As in Tri-County Paving, the record here does not show that Boulevard was similarly situated with other developers with whom it seeks to compare itself. The Court of Appeals found that the defendants' actions in denying the plaintiffs' permit were based "not on the evidence in the record and the aesthetic concerns of the CAB ordinance, but upon the objections of

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[8] Even if Boulevard did have a cognizable property right under the Due Process Clause, its substantive due process claim would fail. "Substantive due process protections run only to state action so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies. ...[T]he fact that state courts are available to redress and correct violations of state law belies the existence of a substantive due process claim." See Tri-County Paving, 281 F.3d at 440-41. Here, the fact that the state courts eventually ordered the City to award Boulevard a permit refutes its substantive due process claim.

citizens of the neighborhood who wanted to stop further development in the area." There is no evidence in the record regarding community objections to any of the other developments or developers Boulevard offer up as "similarly situated."

In addition, the Court finds that the defendants' actions, while without evidentiary support, were nevertheless driven by a legitimate governmental interest; the reasonable give-and-take between government officials and an engaged citizenry. See Gardner, 969 F.2d at 72. As the Fourth Circuit has noted in the substantive due process context

> even if . . . appeasing the public was the only purpose behind the [governmental] action . . . we still cannot say that the [governmental action] bore no rational relationship to the exercise of the state's traditional zoning power. Given the nature of the citizens' opposition [i.e., concerns about overdevelopment] it is clear that the [government was acting well within the ambit of a local zoning authority for purposes of our constitutional analysis. . . . Zoning is inescapably a political function. Indeed, it is the very essence of elected zoning official's responsibility to mediate between developers, residents, commercial interests, and those who oppose and support growth and development in the community. It is not pernicious per se for a zoning authority to be influenced by political pressure in the community[, at least where those political pressures reflect legitimate governmental pursuits]. Such give-and-take between government officials and an engaged citizenry is what democracy is all about.

Sylvia Development, 48 F.3d at 829. Here, as in Sylvia Development, the views expressed by the surrounding residents-concerns over perceived overdevelopment of the

area – are legitimate governmental pursuits. It was therefore legitimate for the defendants to take them into account.

Boulevard argues that because the Court of Appeals has already determined that the defendants' actions were "arbitrary" they cannot be "legitimate." But this argument

> conflate[s] the meaning of the term "arbitrary" as used by the state court in applying state administrative law with the term "arbitrary" as it might be used in a constitutional sense. It does not follow, as [the plaintiffs] contend, from the fact that the [governmental] action was arbitrary as a matter of state law that there was no rational basis ... to support the denial of [the plaintiffs'] application for the [permit]. The [government] did indeed have a rational basis for the denial: [enacting the legitimate governmental concerns of the community]. The Board's action was ruled "arbitrary" not because its reasoning lacked a rational basis, but because the evidentiary record was inadequate to support the Board's findings. This failure is simply a matter of state law.

Id. at 825. Because the defendants' actions, even if discriminatory, were based on a legitimate governmental concern, the Court did not err in granting the defendants judgment on Boulevard's equal protection claim.

IV. Motion for Summary Judgment – Inverse Condemnation and Takings

The elements of inverse condemnation under South Carolina law are: (1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for public use; and (4) the taking has some degree of permanence. See Sea Cabins on the Ocean

IV Homeowners Association, Inc. v. City of North Myrtle Beach, 548 S.E.2d 595, 600 (S.C. 2001). As for the second element – a taking-South Carolina incorporates federal law. See id. at 601. By addressing that element, then, the Cout will simultaneously deal with both the inverse condemnation and takings causes of action.

A. Categorical Takings

Takings are classified as one of two types: (1) categorical or (2) factored. See generally Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014-15 (1992).[10] In the first type, categorical, the government either (1) physically appropriates any part of private land for public use, see Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (taking where law required landlords to place cable TV wires on their property) or (2) by regulation, denies the land of all economically viable use, see Lucas, 505 U.S. at 1016 (regulation denied landowner ability to develop land). If either of these conditions is met, the government must compensate the aggrieved landowner regardless of the state's interest in either the land itself or the regulation limiting its use. See id. at 1015-16. Under the facts of the present case the defendants' permit denial did not constitute a categorical taking; the defendants effected no physical taking nor did their denial of the building permit deny the land of all economically viable use.

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[10] In an attempt to move its case out of this framework, Boulevard argues that the defendants' acts were not a classic taking at all, but rather a governmental exaction. A governmental exaction occurs where the government approves a private landowner's use of his land on the condition that the property, or a portion thereof, is dedicated to public use. See Dolan v. City of Tigard, 512 U.S. 374 (1994). This case, however, involves a permit denial, and does not resemble an exaction. See City of Monterey v. Del Monte Dunes, 526 U.S. 687, 702-03 (1999).

B. Factored Takings

The second type of taking, a factored taking, occurs when a regulation or other limitation on land use interferes with a landowner's rights but does not deprive the land of all economically viable use. See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002); Perm Central Transp. Co. v. New York City, 438 U.S. 104 (1978). In such a case, the Court must examine the extent of the regulation to determine if it goes "too far." See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). The threshold issue in any factored taking, however, is whether the governmental action actually interfered at all with the landowner's antecedent bundle of rights at all. See Lucas 505 U.S. at 1030. If it did not, there was no taking. In this case, the Court finds that the defendants did not interfere with such a right.

Landowners possess realty subject to certain implied limitations, imposed by the state, on its use. See Lucas 505 U.S. at 1029-30. The clearest example of such an implied limitation is the constraint that state nuisance law places on land use: a landowner may not use his land unreasonably such that it substantially interferes with another's right to use and enjoy his land. See id. Despite the fact that state nuisance law thus restricts landowners' ability to use their land, such restriction does not amount to a taking, because the right to use one's land unreasonably was never a part of the title to begin with. See id. This is not to say, of course, that all state regulation that limits land use is allowed under the Takings Clause. Instead, the government must only compensate for that regulation that goes farther than the "background principles," such as (but not limited to) nuisance doctrines, of state law, which limit landowners'

ability freely to use their land. Palazzolo v. Rhode Island, 533 U.S. 606, 629 (2001).[11]

To decide this case, the Court need not determine the exact point at which a landowner's rights abut the background principles of state law. It is enough to say that whatever the scope of those rights are, landowners do not have an absolute right to exercise them immediately. So long as any normal delay in governmental land-use decisionmaking does not result in a categorical taking, i.e., deprives the land of all economically viable use, see First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), the delay, like nuisance law, is an incident of ownership. See id. at 321 ("[A taking does not occur] in the case of normal delays in obtaining building permits, changes in zoning, ordinances variances, and the like."); Agins v. City of Tiburon, 447 U.S. 255, 263 fn. 9 (19S0) ("Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are incidents of ownership. They cannot be considered as a taking in the constitutional sense."); Tahoe-Sierra, 535 U.S. at 352 (2002) ("[T]he short term delays attendant to zoning and permit regimes are a longstanding feature of state property law and part of a landowner's reasonable investment-backed expectations [and do not, therefore, constitute a taking]."") (REHNQUIST, J., dissenting); Scott, 716 F.2d 1421-22 (right to permit issuance is not protected under the Takings Clause); Sea Cabins, 54S S.E.2d at 604 ("[Although a property owner who successfully challenges the applicability of a governmental regulation is likely to

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[11] This doctrine is analogous, but slightly different, from the question of whether a landowner has an entitlement under the Due Process Clause. In that context, the Court examines the amount of discretion the licensing board possesses. In the takings context, the Court examines the extent of regulatory interference as compared to the 'background principles' of state law.

have suffered some temporary harm during the process, the harm does not give rise to a constitutional taking."). As Justice Stevens noted in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City:

> [Such t]emporary harms ... are an unfortunate but necessary by-product of disputes over the extent of the government's power to inflict permanent harms without paying for them. Every time a property owner is successful, in whole or in part, in a challenge to a governmental regulation ... he is almost certain to suffer some temporary harm in the process. At the least, he will usually incur substantial revenue loss because the use of his property has been temporarily curtailed while the dispute is being resolved. . . [This harm] is fairly characterized as a cost of doing business in a heavily regulated society.

473 U.S. 172, 204 (1985) (STEVENS, J., concurring in the judgment) (altered sentence order). Here, Boulevard was forced to wait over four years from the time the City Council denied the permit until the Supreme Court of South Carolina ruled it had improvidently granted certiorari. While this delay was unquestionably a long one, absent a showing of bad faith litigation, the Court finds that it was an "unfortunate by-product" of the adjudicatory system and was not so extraordinary as to raise constitutional implications.[12]

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[12] Even if the Court were to find that typical regulatory delay is a cognizable harm under the Takings Clause, it would still need to determine whether the defendants' actions here went "too far" such that they worked a taking. Under Penn Central and its progeny, the Court would do so by analyzing whether the governmental action substantially furthered a legitimate state interest, see Lucas 505 U.S. at 1015 (noting that a taking occurs when the government regulation (1) denies the owner of all economically viable use (a categorical taking) or (2) does not substantially advance legitimate state interests (a factored taking)); that is, the Court would examine: (1) the extent to

V. Conclusion

For the foregoing reasons, the Court (1) dismisses S&H and Sunrise, (2) denies the motion to reconsider, and (3) grants the motion for summary judgment.

AND IT IS SO ORDERED.

/s/ C. Weston Houck
C. Weston Houck
United States District Judge

August 6, 2004
Florence, SC

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which the regulation interfered with reasonable investment-backed expectations; (2) the regulation's economic effect on the landowner; and (3) the character of the government action. See 438 U.S. at 124. Applying these factors to the facts of this case, the Court would conclude that there was no taking.

First, it is clear that the primary expectation interest is the existing use of the property as a whole. See id. at 136. Boulevard has introduced no evidence that the defendants' actions interfered with the existing use of the site. Second, the plaintiffs ultimately sold the property for a profit of over $800,000 from their 1996 purchase price, a fact belying any claim of "economic harm" in the constitutional use of that phrase. Third, the defendants' invasion with Boulevard's property interest was not a physical invasion, but rather was an interference of the regulatory sort. Cf. id. at 124 ("[A] taking may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."). Moreover, as the Court concluded in the equal protection context, because the defendants, acting pursuant to the CAB ordinance, were merely reacting to the aesthetic concerns of the City's citizens, they were acting in furtherance of a legitimate state interest. The fact that the defendants' permit denial was without evidentiary support does not transform what is essentially a local zoning dispute into a federal constitutional case.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Boulevard Development and
St. John's Inn, Respondents,

v.

The City of Myrtle Beach, Petitioner.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

Appeal From Horry County
J. Stanton Cross, Jr., Master-in-Equity

Memorandum Opinion No. 2002-MO-079
Heard November 21, 2002 – Filed December 19, 2002

[ENTERED: December 19, 2002]

DISMISSED AS IMPROVIDENTLY GRANTED

Frances I. Cantwell, Esquire and William B. Regan, both Regan and Cantwell, of Charleston, for Petitioner.

Howell V. Bellamy, Jr., Esquire and Douglas M. Zayicek, of Bellamy, Rutenberg, Copeland, Epps, Gravely, and Bowers, of Myrtle Beach, for Respondents.

PER CURIAM: We granted a writ of certiorari to review the Court of Appeals opinion in Boulevard Development v. City of Myrtle Beach, Op. No. 2001-UP-91 (S.C. Ct. App. Filed Feb. 13, 2001). We now dismiss the writ as improvidently granted.

DISMISSED.

TOAL, C.J., WALLER, BURNETT, PLEICONES, JJ., and Acting Justice Henry F. Floyd, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Boulevard Development and St. John's Inn,

Respondents,

v.

The City of Myrtle Beach,

Appellant.

Appeal From Horry County
J. Stanton Cross, Jr., Master-in-Equity

Unpublished Opinion No. 2001-UP-091
Heard October 10, 2000 - Filed February 13, 2001

[ENTERED: FEBRUARY 13, 2001]

AFFIRMED

William B. Regan and Frances I. Cantwell, both of Regan & Cantwell, of Charleston, for appellant.

Howell V. Bellamy and Douglas M. Zayicek, both of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, of Myrtle Beach, for respondents.

PER CURIAM: This case involves the application of a municipal zoning ordinance. On two occasions, the Community Appearance Board of the City of Myrtle Beach rejected building plans submitted by the respondents, Boulevard Development and St. John's Inn. After de novo hearings, the Myrtle Beach City Council affirmed the decisions of the Community Appearance Board. Upon a consolidated appeal to the circuit court,

the court reversed city council's decisions and ordered the city to grant approval of the respondents' building plans. The city appeals. We affirm.

FACTS

Article VI of the City of Myrtle Beach Zoning Code establishes the Community Appearance Board (CAB). The supreme court has previously discussed this board in Peterson Outdoor Advertising v. City of Myrtle Beach, 327 S.C. 230,489 S.E.2d 630 (1997). The court stated:

> The Myrtle Beach Zoning Code . . . establishes a Community Appearance Board (CAB) charged with the responsibility of reviewing proposed development in the City,. . . to discourage unsightly and inharmonious development, to assure structures are properly related to their sites and surrounding sites and structures, and proposed structures do not detract from surrounding properties. The CAB is authorized to deny an applicant a building permit if the proposed construction does not satisfy the criteria of §604 of the CAB Ordinance even though the applicant is technically in compliance with other zoning and building requirements. The Ordinance provides for appeal *de novo* to the City Council from a decision of the CAB.

Id. at 233, 489 S.E.2d at 631. Section 604 of the CAB ordinance sets forth standards to be utilized by the board in reviewing submitted plans. Specifically, the standards address matters such as preservation of landscape; relation of proposed buildings to environment; drives, parking and circulation; surface water drainage; utility service; advertising features; special features; and application of design standards.

The respondents purchased a 2.783 acre site at 6803 North Ocean Boulevard in the City of Myrtle Beach. The St. John's Inn was built on this site in the 1960's. The inn is three to four stories high and has eighty-eight (88) units. The respondents wanted to further develop the location and obtained the services of a local architect. He determined the property was zoned TA-120 which, according to applicable city ordinances, would permit approximately four hundred (400) units to be built in a fifteen story high rise. Plans were prepared for a ninety-eight unit (98), fourteen story condominium high rise. The high rise consisted of five stories of parking under nine stories of condominium units. The original St. John's Inn would remain and the new structure would be located behind the inn.

The proposed development went before the CAB for a conceptual review on August 6, 1998. At that time, the CAB expressed concern over the rear of the building and suggested softening the elevation by landscaping. Also, the CAB suggested installation of a sidewalk along 69th Avenue and asked for a rendering of the rear elevation to be presented at the final review. The final review hearing was held on August 20, 1998. Area residents appeared at the hearing and voiced opposition to the project. Thereafter, the CAB voted to disapprove the project. The CAB Disapproval Form cited the following reasons:

> 604.1.1 Fails to preserve the landscape in its natural state as far as practical, by minimizing tree and soil removal and keeping any grade changes compatible with the appearance of surrounding developed areas because *run off from parking garage to swash.*[1]
>
> 604.1.2 Does not relate harmoniously to terrain or existing buildings in the vicinity or create a focal

[1] The italicized portions indicate handwritten comments.

point with respect to avenues of approach, terrain features, or other structures because *height of structure blocks view from permanent residence, existing building.*

604.13.a Fails to provide for safe and convenient pedestrian or vehicular traffic circulation because *all traffic exits to 69th Avenue, no through fare to 17, no sidewalks for pedestrians.*

604.1.3.b Parking area detracts from the design of the proposed building or structure or from neighboring properties because *5-story high blank wall due to code.*

604.1.4 Surface water drainage adversely affects neighboring property or the public storm drainage system because *Cane Patch Swash run off from added traffic, parking, etc., to work its 'way to swash.*

604.1.7 Ancillary features (i.e. exposed storage areas, service areas, loading area, utility buildings, or machinery and equipment installations) are incongruous with neighboring properties because *parking garage backs up to resident's dumpsters.*

Pursuant to the applicable ordinance, the respondents requested a de novo hearing before the Myrtle Beach City Council which was held on September 3, 1998. At the hearing, it was established that the project met all the use, area and dimension requirements of the zoning and building codes. The project architect addressed the council on each of the objections cited in the CAB Disapproval Form. Several individuals, including residents of the surrounding neighborhood, spoke in opposition to the project. Their comments included

concerns about additional traffic, noise, and lighting. Also, views were expressed about the need to stop continued development of transient accommodations in the area.

Council voted at the hearing to affirm the decision of the CAB. A written order was issued denying the application. The order states, in part, as follows:

> The applicant in this case argues that its project satisfies all of the requirements of the zoning and building codes of the City. It further suggests that it will make minor adjustments as necessary to make the project satisfy CAB or Council objections. The opponents argue that a project of the size and density of the proposed project is not in harmony with the surrounding neighborhood, will result in unacceptable traffic congestion that will create serious traffic safety problems, will potentially cause environmental problems in. the swash which runs adjacent to the project site because of storm water runoff, and will negatively affect the view of its neighbors.
>
> After reviewing all the information provided at the hearing, City Council makes the following findings of fact:
>
> 1. The proposed project is a fourteen story building that would contain 98 individual units. The bottom five stories would be a parking garage.
>
> 2. The project as proposed meets all requirements of the Zoning Ordinance except approval by the CAB.
>
> 3. The unrelieved bulk of the proposed structure and its orientation on the lot are

not compatible with the existing buildings in the neighborhood or with the existing building on site.

4. The solid wall on the parking garage is required by the City Zoning Ordinance, but is lacking in architectural features to break the unrelieved visual effect.

5. The proposed location of the solid waste compactor will have an unacceptable visual impact on neighboring properties.

6. The available evidence did not adequately address the possible effects of storm water design on ground water or on the adjacent swash.

When these findings are examined in relation to the criteria in Section 604, Council concludes that the proposed development fails to meet the objectives in Section 601.2(b) and (c) which are to "[d]iscourage monotonous, drab, unsightly, dreary and inharmonious developments"; and to "[c]onserve the city's natural beauty and visual character and charm by insuring that structures. . . are properly related to their sites, and to surrounding sites and structure. . . and that proper attention is given to the exterior appearance of structures—"In particular Council has applied the criteria in Sections 604.1.2, 604.1.4, and 604,1.7 to reach this conclusion.

After issuance of the council order, the respondents appealed the decision to the circuit court.

Subsequently, the respondents made a second application to the CAB for approval of the project. A hearing was held on October 1, 1998 where individuals

spoke on behalf of and in opposition to the project. Once again, CAB denied approval. The respondents requested a de novo hearing before City Council which was held on November 10, 1998. Council voted immediately after the conclusion of the hearing to deny the application. The council vote cited the same factors as in the September order. Again, the respondents filed an appeal to the circuit court. The appeals were consolidated and referred with finality and direct appeal to the master in equity.

After a hearing, the master reversed the two decisions of the City Council. In a lengthy order, the master concluded the decisions violated Peterson in that they were (1) arbitrary, (2) subjective, (3) without evidentiary support, and (4) a denial of respondents' due process and equal protection rights. Further, concluding any further attempts by the respondents to obtain CAB approval were futile, the master applied the criteria and standards articulated in Zoning Ordinance Section 604 to the evidence in the record. He ordered City Council to grant approval of the respondents' plans as presented at the November 10, 1998 council meeting.

STANDARD OF REVIEW

Our supreme court has already determined the City of Myrtle Beach may validly exercise its authority to enact a zoning regulation based on aesthetic considerations. Peterson Outdoor Advertising v. City of Myrtle Beach, 327 S.C. 230,489 S.E.2d 630 (1997). As noted in Peterson, the decision of a reviewing body with respect to a zoning matter will not be disturbed by the court if there is evidence in the record to support the reviewing body's decision. Id. (citing Historic Charleston Foundation v. Krawcheck, 313 S.C. 500, 443 S.E.2d 401 (Ct. App. 1994)). A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision. Id. (citing Talbot v. Myrtle Beach Board of

Adjustment, 222 S.C. 165, 72 S.E.2d 66 (1952)). However, a decision of a reviewing body will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the reviewing body has abused its discretion. Restaurant Row Associates v. Horry County, 335 S.C. 209, 516 S.E.2d 442 (1999).

ISSUES

The city presents five stated issues: (1) Was there evidence on the record to support the decision of the city; (2) Does the record support the findings that the developer's rights of due process and equal protection were violated; (3) Are the findings of the trial judge consistent with the evidence; (4) Do the findings of the trial judge demonstrate a misunderstanding of the CAB process; and (5) Did the trial judge substitute his judgment for that of the council These five stated issues essentially present two arguments. First, did the trial court err in reversing city council's decision because there is evidence in the record to support the decision? Second, did the trial court err in substituting its judgment for that of the City Council?

LAW/ANALYSIS

As previously noted, the respondents' building plans met all requirements of the city's zoning and building codes except for CAB approval. The city council, sitting in a de novo capacity, twice denied the respondents' application for four stated reasons. The reasons were (1) the unrelieved bulk of the proposed structure and its orientation on the lot are not compatible with the existing buildings in the neighborhood or with the existing building on site, (2) the solid wall on the parking garage is required by the City Zoning Ordinance, but is lacking in architectural features to break the unrelieved visual effect, (3) the proposed location of the solid waste

compactor will have an unacceptable visual impact on neighboring properties, and (4) the available evidence did not adequately address the possible effects of storm water design on ground water or on the adjacent swash. In rendering its decisions, City Council cited to specific criteria in Section 604 of the ordinance. However, the trial judge found each of the reasons arbitrary and subjective because they were not supported by the evidence. Based upon our review, we find no error in the trial court's decision.

As to the bulk of the structure and orientation on the lot, current zoning permits a high rise on the site. The proposed structure is not the first high rise in the area. Photographs in the record show there are other high rise buildings in the immediate vicinity. Significant opposition to the project was voiced by residents of the Sea Mark Towers, a high rise condominium located behind the St. John's Inn. Notably, new construction at the St. John's Inn would block the ocean view currently enjoyed by residents of Sea Mark Towers.

With respect to the location of the solid waste compactor, the city requires a compactor on site to handle waste disposal from the St. John's Inn. The compactor was planned to be located next to a truck loading zone for ease of access. The respondents proposed landscaping around the compactor to conceal it from street level view. However, without eliminating the required compactor, there is no way to prevent it from being viewed by residents of the upper floors of the Sea Mark Towers.

As to the parking garage, a solid wall is required by the city zoning ordinance. The respondents added decorative features to the wall, but City Council rejected these plans. Finally, the City Council expressed concern about the effect of storm water drainage on the swash. The respondents presented a storm water management

plan. The United States Department of the Interior conducted an on site inspection of Cane Patch Swash. The department concluded the storm water management plan for the proposed project would reduce the present storm water inputs.

A review of the transcripts of the hearings before City Council reveals a significant anti-development sentiment among neighborhood residents. Several City Council members expressed similar concerns. To quote one council member, "it's a beautiful project, and I don't have a problem with the project. But if the community has a problem with the project, I've got problems with the project."

The law requires that the decision of the reviewing body not be arbitrary. The case of Bannum, Inc. v. City of Columbia, 335 S.C. 202, 516 S.E.2d 439 (1999) is enlightening in this regard. Bannum, Inc. desired to manage a residential "halfway house" for persons recently released from federal prison. The company applied for a special exception permit that would allow such a facility in a C-3 district. Residents of the area opposed the permit. The Zoning Board of Adjustment denied the special exception permit holding the halfway house would have a negative impact on traffic, vehicular and pedestrian safety. Upon review, the supreme court found the denial of the permit was arbitrary. The court reviewed the record and concluded that "it is inescapable to us that the ZBA's decision was based, not on the requirements of the 'special exception' ordinance, but upon the fears of neighboring residents who did not want 'those type of people' in their neighborhood." Id. at 207, 516 S.E. 2d at 441. While the court was sympathetic to the concerns of neighboring individuals, it concluded the ordinance did not provide such a basis for denial of the permit.

We conclude the decision of City Council was arbitrary because it was based, not on the evidence in the record and the aesthetic concerns of the CAB ordinance, but upon the objections of citizens of the neighborhood who wanted to stop further development in the area.

The city also argues the trial court erred in substituting its judgment for that of City Council and in ordering council to grant approval of respondents' building plans. We agree with the trial judge that a remand for another hearing before the CAB or City Council would be futile. The respondents have already appeared before both bodies on two occasions. The trial judge analyzed the standards in Section 604 and applied them to the objective evidence in the record. Based upon our review of the trial judge's findings, we find no error.

The decision of the trial court is

AFFIRMED.

STILWELL, HOWARD, AND SHULER, JJ., concur.

STATE OF SOUTH CAROLINA COUNTY OF HORRY	))	IN THE COURT OF COMMON PLEAS
Boulevard Development and St. John's Inn, Plaintiffs/Appellants, vs. The City of Myrtle Beach, Defendant/Respondent.	))))))))))	CIVIL ACTION NOS. 98-CP-26-3516 98-CP-26-4311

[ENTERED: MAY 13, 1999]

ORDER

HEARING DATE	:February 23, 1999
JUDGE	:Hon. J. Stanton Cross, Jr.
PLAINTIFFS' COUNSEL	:Howell V. Bellamy, Jr., :Douglas M. Zayicek
DEFENDANT'S COUNSEL	:Frances I. Cantwell
AMICUS CURIAE	:Michael Barnett, for the Sea Mark Towers Homeowners Association
COURT REPORTER	:Donna Martin

The matters before the Court were consolidated appeals of Defendant's multiple denials of Plaintiffs' building plans by Defendant's Community Appearance Board ("CAB") and City Council, and Plaintiffs inability to even apply for a building permit.[1] Defendant's denials are reversed because they violate *Peterson Outdoor Advertising v. City of Myrtle Beach*, 489 S.E.2d 630 (S.C. 1997), in that they were: 1) arbitrary; 2) subjective; 3)

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[1] CAB approval must be obtained before a land owner can even apply for a building permit. Myrtle Beach Zoning Ordinance § 603.1.

without evidentiary support; and 4) a denial of Plaintiffs' due process and equal protection rights. Further, the Court has applied Defendant's specific CAB criteria and standards, in Zoning Ordinance Sections 604.1 and 604.2, based on the evidence in the record. Based on that evidence and the futility of any further attempts by Plaintiffs to get CAB approval, the Court orders Defendant grant CAB approval of Plaintiffs' plans presented to City Council on November 10, 1998.

I. FACTS

This case involves the important questions of: 1) whether Defendant can reject a property owner's development plans for arbitrary and subjective reasons; and 2) if Defendant is going to deny a land owner's development plans, does that denial have to be supported by objective, nonarbitrary reasons which tell the developer what corrective actions can be taken in order to receive building approval. Both questions are answered in *Peterson Outdoor Advertising v. City of Myrtle Beach*, 489 S.E.2d 630 (S.C. 1997). The answer to the first question is clearly "no." The answer to the second question is clearly "yes."

Plaintiffs proposed to build a 98 unit, 14 story condominium high rise on their property in Myrtle Beach. It is uncontested that Plaintiffs' plans comply with all City ordinances, but the plans were rejected on two occasions by Defendant's CAB, and on two other occasions by Defendant's City Council sitting as the CAB on appeal. Although Defendant rejected the plans on four separate occasions, Defendant did not introduce any exhibits to contradict any of Plaintiffs' exhibits, nor did Defendant give any objective explanation as to why it denied Plaintiffs' plans.

The alleged reasons relied on by Defendant in denying the plans, as discussed below, were arbitrary and

subjective, had no evidentiary support in the record, and more importantly did not in any [way] inform Plaintiffs what changes had to be made to the plans in order to get Defendant's approval. The alleged reasons were not specific nor based on any objective criteria, and put Plaintiffs in the impossible position of having to read Defendant's mind to determine what had to be done to get approval.

Plaintiffs, however, attempted in good faith to work with Defendant and address Defendant's denials. Plaintiffs even repeatedly asked Defendant what changes needed to be made to Plaintiffs' plans in order to receive CAB approval, told Defendant they would change whatever Defendant wanted changed, and that money was not an issue (at the time). Defendant, however, refused to even give Plaintiffs any objective guidance as to what would have to be done to obtain CAB approval. Plaintiffs filed these appeals after being rejected on four separate occasions by Defendant and faced with the futility and prohibitive expense of any further plan submissions.

Ronnie Sorrells and Rusty Helm, through their corporate entities (hereinafter collectively referred to as "Plaintiffs"), purchased the St. John's Inn and accompanying real estate in May, 1996, specifically for its development potential. The St. John's Inn is located at 6803 North Ocean Boulevard, and the property is zoned TA-120 under the City's zoning ordinance.

Directly behind the St. John's Inn is the Sea Mark Tower, which is a high rise that will have its primary ocean view blocked when the new St. John's building is built. It is undisputed, and the record clearly shows the Sea Mark Tower residents were the most vocal opponents of Plaintiffs' plans and started the opposition solely to protect their ocean view.

Prior to purchasing the St. John's Inn, Plaintiffs contacted noted Myrtle Beach architect Tom Pegram for a determination of die potential uses of the property. Mr. Pegram, after examining the City ordinances applicable to a TA-120 zoning district, determined the property was zoned for approximately 400 units, would allow a 15 story high rise,[2] and would be harmonious with other development in the area.[3]

After this determination was made, Plaintiffs purchased the property and hired Mr. Pegram to design a high rise for the property. Over the next several months, Plaintiffs and architect worked together to develop plans for the condominium project Plaintiff and Mr. Pegram eventually agreed on 98 unit, 14 story project.[4] It is undisputed the plans comply with all City ordinances, except for obtaining CAB approval.[5]

During the planning process, Mr. Pegram held five meetings with the (then) City Zoning Administrator, Mr. Lyle Kershner, to discuss the project plans. Those meetings occurred on: April 27, May 1, May 22, June 1,

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· Plaintiffs' Exhibit 36.

· Plaintiffs' Exhibits 6 and 21. It is undisputed that there are high rises all around Plaintiffs' property. Plaintiffs' building thus would not be the first of its kind in the subject neighborhood, much less on the Grand Strand.

· Which is far less than the density and height specifically allowed under the City's ordinances for Plaintiffs' property.

· Except for CAB approval, which is the subject of these appeals. *See* City Council Order dated September 2, 1998. Finding of Fact 2 states "[t]he project as proposed meets all requirements of the Zoning Ordinance except approval by the CAB." Therefore, all concerns relating to height, density, parking, storm water management, traffic, setbacks, etc. have been addressed by the proper City officials and/or staff. These officials, as discussed below, approved the project from a zoning and building code perspective and clearly would issue a building permit if CAB approval were given.

and June 26, all in 1998.[6] The meetings were specifically held to ensure the plans met all City standards and requirements. As a result of the meetings, Plaintiffs had to change their plans to comply with Defendant's newly-enacted setback requirements.[7] Plaintiffs, however, made the changes to comply with the code.

After each meeting, Defendant's zoning and planning officials assured Plaintiffs their plans complied with all city ordinances.[8] As a result of those meetings, Mr. Kershner testified that he personally reviewed Plaintiffs' plans, and they complied with all City ordinances.[9] Therefore, the only thing Plaintiffs needed to receive a building permit was CAB approval. At this time, there was no evidence indicating the plans would not be approved.

A. THE FIRST TWO APPEARANCES BEFORE THE CAB[10]

Knowing its plans complied with all City ordinances and received the blessing of the Zoning Administrator, Plaintiff presented its conceptual plans to the CAB on August 6, 1998.[11] The sole purpose of conceptual review is "to give the developer the opportunity to get the consensus of the [CAB] as to what they feel is appropriate for that particular location and make whatever changes

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· Plaintiffs' Exhibit 2.

· Transcript of September 3, 1998 Hearing, pp. 18-22.

· Transcript of September 3, 1998 Hearing, p. 19.

· Transcript of September 3, 1998 Hearing, pp. 15, 16.

· Plaintiffs have filed a separate action challenging the composition of the CAB. All matters relating to the CAB, its members, conflicts of interest, etc. are being addressed elsewhere.

· Plaintiffs' Exhibit 5.

they feel that are necessary to comply with the comments" made by CAB.[12]

The **only** concern expressed by the CAB at the August 6 meeting was the rear elevation of the building.[13] Thus, the only CAB condition for final approval was for Plaintiffs to "bring a rendering of the rear elevation to the Final review."[14] Some residents of the Sea Mark Tower, however, whose primary ocean view would be blocked by the proposed St. John's tower, were present at the August 6 meeting and stated the placement of the proposed building would destroy their ocean view. As the minutes for the August 6 meeting state, "Some residents of Sea Mark Towers, the rear adjacent property, were present for the meeting and several addressed the Board with their concerns over the placement of a new tower."[15]

Plaintiffs returned for final review on August 20, with drawings to address CAB's lone concern regarding the rear elevation of the building. The minutes of the August 6 meeting clearly show no other concerns were raised by CAB. Plaintiffs satisfied CAB's lone concern about the rear elevation of the building, meaning final approval on August 20 should have been automatic. CAB, however, denied Plaintiffs' plans for entirely new and different

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[12] Transcript of September 3, 1998 Hearing, p. 25 (quoting Lyle Kershner).

[13] Plaintiffs' Exhibit 5. The minutes of that meeting clearly reflect what was said at the August 6 meeting, and CAB has approved those minutes.

The CAB also suggested a sidewalk along 69th Avenue, but a developer cannot unilaterally put a sidewalk within the City's right of way. Plaintiff later agreed to pay for a sidewalk if it were approved by the City, and presented several drawings showing a sidewalk. The sidewalk issue was never raised again.

[14] *Id.*

[15] *Id.*

reasons that had not even been raised to that point. The alleged reasons given by the CAB to support its denial were:

1. Run off from parking garage to Cane Patch Swash;

2. Height of structure blocks ocean view of Sea Mark Towers residents;

3. All traffic exits to 69th Avenue, with no throughfare to 17, and no sidewalks for pedestrians;

4. Five story blank wall required by City code;

5. Run off to Cane Patch Swash;

6. Parking garage backs up to Sea Mark Towers' garbage dumpster.[16]

The only evidence in the record that supported the first CAB denial, however, was that Plaintiffs' building would block the Sea Mark Tower residents' ocean view. There simply was no evidence introduced at the CAB hearing, or in these appeals, that supported the other findings. Defendant did not even attempt to defend the CAB's first denial in these appeals.

B. THE FIRST APPEAL TO CITY COUNCIL

Even though on appeal Defendant did not defend the CAB's first denial, it is important to acknowledge the

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[16] CAB Disapproval Form, attached to Plaintiffs' Exhibit 8. Reason 6 is misstated. The CAB concern was that the St. John's dumpster could be seen by the Sea Mark Tower residents. The Sea Mark Tower and Plaintiffs' proposed high rise are adjacent to each other, and, because of Sea Mark Tower's dumpster location, Plaintiffs' parking garage could not physically back up to the Sea Mark Tower dumpster.

good faith actions taken by Plaintiffs to address the CAB's alleged reasons for denial. Plaintiffs appealed the August 20 CAB denial to Defendant's City Council. City Council held a de novo hearing on September 3, 1998. At that hearing, Plaintiffs addressed each CAB alleged reason for denial[17] and introduced 28 exhibits into the record. To specifically respond to CAB's denial, Plaintiffs went point by point through the CAB disapproval form and rebutted each reason for denial through reference to the evidence, exhibits, and law.[18]

Plaintiffs started by showing City Council the same plans and sketches that were shown to CAB,[19] and a large site plan of the area.[20] Plaintiffs then introduced other exhibits, including new and revised rear elevations of the garage, to rebut the CAB denial. Plaintiffs introduced its storm water management plan that City staff admitted complied with the City's storm water runoff requirements.[21] The plan specifically contained all runoff on site through exfiltration piping, meaning there would be no runoff into the swash. City staff agreed with Plaintiffs' plans, and there was not a shred of evidence showing the proposed building would cause any runoff to the swash. Ironically, the uncontested evidence clearly showed the water quality in the swash would actually improve as a result of Plaintiffs' project Thus, the CAB's

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[17] *See* St. John's Response to Community Appearance Board Disapproval Form For Meeting of August 20, 1998, attached to Plaintiffs' Exhibit 8. The Response gives a detailed rebuttal to each alleged CAB reason for disapproval.

[18] Transcript of September 3 Hearing, pp. 34-44.

[19] Transcript of September 3 Hearing, p. 22, ll. 21-25; p. 6, ll. 16-19.

[20] Transcript of September 3 Hearing, p. 25, l. [illegible]

[21] *See* Plaintiffs' Exhibit 22.

two stated concerns regarding runoff were completely unfounded and without evidentiary support.[22]

Plaintiffs also presented evidence that the height of the building was well within the height limitations required by City code.[23] Lyle Kershner agreed, and specifically stated the project complied with all use, height, and density requirements in the City's zoning ordinance. Plaintiff also introduced a letter from Kit Christopher, who developed the Sea Mark, which stated that no Sea Mark resident was ever guaranteed their ocean view could not be blocked.[24] Further, Plaintiff informed City Council there is no easement of view in South Carolina; thus, the Sea Mark Tower residents losing their ocean view was not a legal or valid reason for denial.

Another series of exhibits showed the proposed building accessed both 69th Avenue and Ocean Boulevard, specifically contrary to the CAB's findings concerning ingress and egress.[25] Jack Walker, the City planner, also stated the project complied with the City's traffic studies that project City traffic patterns through the year 2015.

Plaintiffs then specifically showed the five story wall on the parking garage was required by the City code. To

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- City staff agreed Plaintiffs' storm water management plan satisfied Defendant's ordinances. Plaintiffs argued neither CAB nor City Council could therefore require Plaintiffs to exceed the City's own requirements, and arbitrarily require Plaintiffs provide a better storm water management plan than is required of any other person in the City. On appeal, Defendant did not argue that inadequate storm water runoff was a valid basis for any of the denials.

- *See, e.g.,* Transcript of September 3 Hearing, p. 31, ll. 14-20.

- Plaintiffs' Exhibit 9.

- This issue was never raised again. See Plaintiffs' Exhibits 6 and 7, for example.

address the concern that the wall was "blank," Plaintiffs presented drawings of the wall with decorative architectural treatments and additional landscaping.[26] Plaintiffs also addressed the CAB's concern that Plaintiffs' dumpster backed up to the Sea Mark Tower, by showing that the City code required Plaintiffs have a compactor on site and City staff asked that it be located where Plaintiffs' plans proposed.

Finally, and most important, Plaintiffs presented several variations of die building exterior, and specifically told City Council it was perfectly willing to implement any variation that Council liked best, and that money was not an issue.[27]

Although several Sea Mark Tower residents voiced their concerns at the September 3 hearing about losing their ocean view, the opposition and Defendant attempted to shift the focus to a showdown over stopping development at any price. Every opponent of Plaintiffs' plans who spoke at the September 3 hearing specifically and unequivocally argued die issue was one of stopping development in this area of Myrtle Beach.[28] Although the discussion was heated, no one who spoke against the project, introduced any evidence into the record which purported to show that the project did not comply with

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[26] Transcript of September 3 Hearing, p. 28, ll. 6-16. See Plaintiffs' Exhibits 1.9 and 20 for two different proposed walls presented to City Council.

Other parking garages in the City, however, have completely blank walls and die City did not state why Plaintiff was being singled out when Defendant had approved other "blank" walls in me past. *See, e.g.,* the Caravelle parking garage clearly shown on Plaintiffs' Exhibit 21. The wall on that parking garage is completely blank.

[27] Transcript of September 3 Hearing, p. 32, ll. 11-25.

[28] Plaintiffs' Memorandum discusses the statements made at the hearing, and those statements are included herein by reference.

some City ordinance or should not receive CAB approval based on objective criteria.

When Council began its discussion on September 3, it made clear that its only concern was stopping Plaintiffs' plans regardless of the evidence. Council member Rodman began the discussion and set the tone by stating that "we have to consider how this [project] fits into the visioning process and the comprehensive plan,"[29] "if you think this is bad, just wait to see what's coming down the road,"[30] and that "at some point in time we have to say this is enough. We've had enough development, enough high rises, enough units, maybe enough money made in this area."[31]

Council member Cain ironically commended Plaintiffs' project for its design and stated that he didn't have a problem with the project, but if the community had a problem with it, then he did.[32] Council member Woods stated that "it's time to do some things."[33] Finally, Mayor McBride stated "I have a problem personally, myself, when there's a TA-120 [zone] beside a residential unit, a residential [zone]. That's something Council has to address.... [W]e have to get in and start addressing, you know, high density, high height beside a residential unit."

Although development and rezoning are valid concerns for Defendant to address by future proactive changes to the zoning ordinance, Defendant was bound to

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- The Visioning Process and Comprehensive Plan are not City ordinances and can not, therefore, supercede ordinances lawfully adopted.

- Transcript of September 3 Hearing, p. 96.

- Transcript of September 3 Hearing, p. 98.

- Transcript of September 3 Hearing, p. 107.

- Transcript of September 3 Hearing, p. 110.

apply the zoning laws in effect, and rightfully relied on by Plaintiffs' in good faith, at the time Plaintiffs' plans were submitted for approval. City Council clearly showed at the September 3 hearing that it had no intention of considering Plaintiffs' plans. Plaintiffs' application for CAB approval was no longer about whether the plans satisfied the City code or any objective standards or criteria. City Council made the issue into one of using the CAB process as a sword to stop lawful development.

No evidence was presented to rebut Plaintiffs' exhibits. Council did not take the time to examine the exhibits submitted by Plaintiffs, nor did they listen to their own officials and staff who stated the plans complied with all City ordinances. Council simply voted to affirm the CAB denial even though it was uncontested that there was no evidence in the record to support that denial. However, City Council decided to draft an order with its own findings of fact after receiving advice from the City Attorney.

At the September 8, 1998 City Council meeting, Council adopted an Order denying CAB approval. The reasons for denying approval cited by Council were a variation of the original CAB reasons along with new and different reasons. Specifically, Council stated that even though the proposed project met all zoning requirements:

1. The unrelieved bulk of the proposed structure and its orientation on the lot are not compatible with the existing buildings in the neighborhood or with the existing building on site;

2. The solid wall on the parking garage is required by City code, but is lacking in architectural features to break the unrelieved visual effect;

3. The proposed location of the solid waste compactor will have an unacceptable visual impact on neighboring properties; and

4. The available evidence did not adequately address the possible effects of storm water design or ground water on the adjacent swash.[34]

C. THE THIRD APPEARANCE BEFORE THE CAB

In a good faith effort to address CAB's and City Council's concerns, and to comply with *Peterson Outdoor Advertising v. City of Myrtle Beach,* 489 S.E.2d 630 (S.C. 1997), Plaintiffs went back before the CAB on October 1, 1998 with a new series of drawings.

Plaintiffs addressed in detail each of City Council's concerns. Plaintiffs showed various new drawings addressing the trash compactor, and new landscaping around the trash compactor.[35] Plaintiffs also presented a drawing of the building with no compactor, which clearly would satisfy City Council's concerns. However, Plaintiffs also presented a letter from Linda Ladd, City Solid Waste Management Superintendent, which stated that Plaintiffs were required under City code to have a compactor on site.[36] Plaintiffs then stated they would do whatever the CAB requested regarding the trash compactor, but it was placed where the City requested.[37]

- Order of City Council, dated September 3, 1998.

- Transcript of CAB hearing, October 1, 1998, pp. 2-6. *See, e.g.,* Plaintiffs' Exhibits 43 and 45.

- Plaintiffs' Exhibit 29.

- Transcript of October 1 CAB Hearing, p. 5.

To address City Council's concerns regarding the required blank wall on the parking garage, Plaintiffs presented new drawings showing the wall decorated with landscaping, Bermuda shutters, vertical pilasters, and an angular roof,[38] at great expense to Plaintiffs.

Plaintiffs also introduced Exhibits 6 and 21, which clearly show the other high rises in the immediate vicinity to rebut any possible claim that Plaintiffs' proposed high rise was somehow not in line with other development in the area. Plaintiffs' Exhibits 3 and 4 also show the proposed building will be the same color, have the same angular roof design, etc. as the existing St. John's Inn, and will not be incompatible with the existing building on site.

Further, Plaintiffs again presented its storm water management plan that the City officials and staff already agreed complied with the City requirements.[39] Plaintiffs also showed its plans would actually improve the water quality of the swash because the current runoff from the St. Johns Inn would be contained on site. A letter from the Department of Interior was also introduced showing the United States government commended Plaintiffs' storm water management plan.[40]

Finally, to address the CAB's earlier concerns about a sidewalk (a concern not even mentioned by City Council), Plaintiffs presented a drawing showing a sidewalk and stated it would provide a sidewalk where the CAB requested.[41]

- Transcript of October 1 CAB Hearing, pp. 9-10. *See* Plaintiffs' Exhibit 47.

- Transcript of October 1 CAB Hearing, pp. 17-19.

- Plaintiffs' Exhibit 30.

- Transcript of October 1 CAB Hearing, p. 4.

Once again, several Sea Mark residents stated they did not want their ocean view blocked,[42] and other opponents stated they were opposed to any further development in the area regardless of whether the project complied with all City ordinances. As before, however, there was no competent, objective evidence introduced to show that Plaintiffs' plans did not satisfy any CAB criteria.[43]

The CAB again denied its approval by a vote of 5-4. Although the CAB read into the record several criteria it can consider when reviewing a project,[44] it did not provide any objective reasons as to why it denied its approval, nor did it provide any evidence to support its denial.

In her motion to deny, Ms. Howard referred to runoff to Cane Patch Swash and to an alleged wind tunnel effect between the project and the Sea Mark Tower.[45] Prior to the vote, however, Ms. Howard specifically dropped those reasons.[46] Mr. Conn stated that the project was "inharmonious with the neighborhood because it's the densest area of the City."[47] As stated above, however, Lyle Kershner specifically stated the project complied with the

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• Several speakers specifically discussed being able to sit on their balcony and watching the sea gulls and sunrises.

• Again, Plaintiffs' Memorandum discusses these statements and that discussion is included by reference.

• Transcript of October 1 CAB Hearing, pp. 46-51.

• Opponents argued there could be a wind tunnel effect between the Sea Mark and St. John's. The structural engineers for **both** projects, however, stated there would not be a wind tunnel effect. Regardless, neither the CAB nor Council relied on any alleged wind tunnel effect as a reason for denial. The issue is therefore moot.

• Id. p. 51.

• *Id.* p. 47.

density requirements in the City code.[48] Finally, Mr. Conn stated the added traffic would be too much,[49] disregarding the uncontroverted evidence that the project compli[illegible]ith the City's traffic plan that projected traffic through[illegible].15.

D. THE SECOND APPEAL TO CITY COUNCIL

Plaintiffs appealed the CAB's second denial to City Council for a second de novo hearing on November 10. Even though this was billed as a de novo hearing, Council decided before the hearing even began that Plaintiffs were only going to have 15 minutes to present their case. Although Plaintiffs were only given 15 minutes,[50] it countered each of the CAB's reasons for denial and addressed Council's previous concerns by premarking and introducing 47 exhibits.[51] At the end of Plaintiffs' presentation, Mr. Pegram again specifically asked Council what Plaintiffs would have to do to get CAB approval if the City did not like the latest set of plans.[52] No Council member responded. Plaintiffs' counsel also asked Council what changes Plaintiffs had to make to get Council approval. Again, no Council member responded.

Several residents again addressed their concerns regarding over development, but again, no evidence was

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- Also, density is solely controlled by zoning and the City code. Density is not a factor within the discretion of the CAB, and the CAB cannot unilaterally alter the City's zoning ordinances. *See* City Zoning Ordinance § 604.3.

- *Id.* p. 48.

- Which Plaintiff strongly objected to.

- Approximately 20 more exhibits than were introduced at the first City Council hearing.

- Transcript of Nov. 10 Hearing, p. 31, ll. 16-21; p. 33, ll. 8, 9.

introduced in support of denying the project.[53] Council refused to review any of Plaintiffs' 47 exhibits, 21 of which were new and were not presented to Council at the first de novo hearing. Before discussion on the Motion even began, Mayor McBride stated that he did not believe this was a taking of property.[54] Before a vote was taken, Mayor McBride asked for decorum **when the appeal was denied.**[55]

When the vote finally occurred, the appeal was denied 4-1. Council member Rodman read a prepared statement that based the denial on the same grounds as Council's first denial, and Council adopted its first order verbatim. At no point did Council give any objective reasons as to what it did not like about Plaintiffs' plans, or why the new drawings and exhibits did not satisfy their earlier concerns.

These appeals followed.

II. LAW

These appeals are controlled by *Peterson Outdoor Advertising v. City of Myrtle Beach,* 489 S.E.2d 630 (S.C. 1997). In *Peterson,* the South Carolina Supreme Court held a zoning decision must be overturned if: 1) it is arbitrary or subjective; 2) it is based on errors of law; 3) it is without evidentiary support; 4) the board acts arbitrarily or unreasonably; 5) or where, in general, mere is an abuse of discretion. *Id.* at 633. The Supreme Court in *Peterson* held Myrtle Beach's denial of CAB approval for a billboard was completely arbitrary and subjective, and the Court strongly affirmed the trial court on that

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- Again, Plaintiffs' Memorandum discussed these statements and that discussion is included by reference.

- Transcript of Nov. 10 Hearing p. 70, ll. 13, 14.

- *Id.* p. 79, ll. 5,6.

point. The Court specifically rejected the City's argument that it could apply subjective standards or reject a project for solely arbitrary and subjective reasons, and stated "[w]hat one person may find unsightly or inharmonious may be pleasing to another." *Id.* Defendant's actions in the case are in flagrant disregard of the Supreme Court's ruling in *Peterson*.

A review of the reasons City Council relied on to reject Plaintiffs' plans shows the arbitrary and subjective nature of the Defendant's acts.[56] First, City Council stated "the unrelieved bulk of the proposed structure and its orientation on the lot are not compatible with the existing buildings in the neighborhood or with the existing building on site." This statement is so subjective and vague that as a practical matter it is meaningless. There are only two references in the record concerning the relationship between Plaintiffs' proposed building and other buildings. The first is listed on the first CAB Disapproval Form,[57] which states that Plaintiffs' building would block the view of the Sea Mark Tower residents. There is no easement of view in South Carolina, however. *O'Shea* v. *Lesser,* 416 S.E.2d 629 (S.C. 1992); *Hill* v. *The Beach Co,* 306 S.E.2d 604 (S.C. 1983).

The second reference came from Mayor McBride, who stated he had a problem with a high rise building being next to a residential area. As stated above, Plaintiffs' property is zoned TA-120, and the use, height, and density proposed by Plaintiff complies with all City ordinances for a TA-120 zone. Also, the residential area referred to by Mayor McBride is the Sea Mark Tower

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- Plaintiffs appealed both CAB denials and both City Council denials. The record clearly shows, and Defendant did not argue otherwise on appeal, that the CAB denials were arbitrary, subjective, and without evidentiary support. The Court therefore only addresses the specifics of City Council's denials in this Order.

- *See* Attachment to Plaintiffs' Exhibit 8.

property, which already contains a high rise. Defendant did not, and could not, argue that two high rises could not be near each other within the City limits.

Defendant does not reference any exhibits, evidence, or objective criteria that it relied on to justify its claim that Plaintiffs' building would in any way be "incompatible" with the neighborhood. The evidence showed various high rises all around Plaintiffs' property. Had Defendant stated that Plaintiffs' building is "incompatible" because it is blue and every other building in the neighborhood was white, Plaintiffs would know exactly what needed to be done in order to obtain approval—paint the building white. Simply stating the plans were not "compatible" with the neighborhood in light of the uncontested evidence to the contrary is a meaningless and hallow rejection, which states nothing about what is wrong with the plans or what needs to be done in order to get approval.

Further, Plaintiffs' building the project would not be the first high rise in Myrtle Beach, or even the first one in this area. The oceanfront, second row, and third row[58] is lined with high rises, and Plaintiff presented evidence of other high rises surrounding the St. John's Inn, including a high rise directly west, and several directly east, of the St. John's.[59] The most vocal opponents of Plaintiffs' plans are the residents of the Sea Mark Tower, which is a high rise directly behind the St. John's Inn. Mr. Pegram also testified that his firm has designed over thirty high rises in Horry County, and this is the first project to be rejected. This fact, coupled with the express statements made by City Council members, shows Defendant's denials are about stopping development in select areas of the City, and have nothing to do with the specifics of

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[58] Ironically, the Sea Mark Tower is on the third row.

[59] *See* Plaintiffs' Exhibits 6 and 21.

Plaintiffs' project. Simply put, Defendant has not pointed out any objective evidence that shows Plaintiffs' plans are "incompatible."

Regardless, Defendant's "not compatible" argument was specifically shot down by the Supreme Court in *Peterson.* In *Peterson,* the CAB denied the billboard applications because they would cause "too much clutter," "did not add to the aesthetics of the area," "did not look good," and "**were incompatible with the area.**" *Id.* The Supreme Court said these were arbitrary, subjective, and invalid reasons to deny CAB approval. Defendant City Council's first reason for denial is therefore in flagrant disregard for the Supreme Court's mandate.

Second, City Council stated that "[t]he solid wall on the parking garage is required by City code, but is lacking in architectural features to break the unrelieved visual effect." This reason is also arbitrary and subjective, because as the *Peterson* Court stated, "what one person may find unsightly . . . may be pleasing to another." The wall is attractively decorated and blends well with the proposed building. Most important, there is no evidence in the record as to what is wrong with the wall, or what needed to be changed to get City Council's approval. Plaintiffs presented four versions of the wall to Defendant, and Defendant merely said each one was unacceptable. Without specific, objective criteria and reasons as to what was wrong with the wall, Defendants could deny Plaintiffs' plans forever by just saying the wall is unacceptable.

City zoning ordinance § 1211.5.12(d) specifically requires that when a parking garage abuts a residential area, the first 25 feet of the garage "must be of solid face construction." Thus, Plaintiff cannot unilaterally change the City's ordinances-the first 25 feet must be a solid wall, which creates the alleged "unrelieved visual effect." Plaintiff presented four different versions of the wall

throughout the different hearings before the CAB and Council to address this issue,[60] and told Council it would implement any plan Council selected, and that money was not an issue. Plaintiff added various decorative treatments to the wall, but got no feedback from Council. There is absolutely no evidence in the record as to what Defendant objected to on any version of the wall or what "architectural features" were lacking, nor is there any evidence of Defendant giving any guidance as to what changes would have to be made to the wall to get approval. Plaintiffs' Exhibit 47 shows a very attractive, decorative wall with no room for any other architectural features to be added. Defendant continues to maintain that somehow Plaintiffs' Exhibit 47 is not attractive enough, but Defendant refuses to give any objective guidance as to what changes are needed. Plaintiffs went so far as to say they would do whatever Defendant wanted done to the wall. Defendant, however, refused to even give Plaintiffs any guidance.

Neither *Peterson* nor due process require a land owner to read Defendant's mind. The CAB process is not a guessing game, shell game, or adversarial process between a land owner and Defendant. If Defendant is going to deny a developer's plans, it must give objective, nonarbitrary reasons for doing so such that the developer has an idea what changes are needed in order to get Defendant's approval. Simply and repeatedly saying that something is not attractive enough is not a valid reason for denial and not a constitutionally sufficient reason to keep a landowner from developing their property in accordance with the generally applicable zoning ordinances. Plaintiffs presented four different versions of the wall to Defendant throughout the four hearing process. Each time Defendant would say that the wall

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[60] The last being Plaintiffs' Exhibit 47, which was only introduced at the November 10 City Council hearing (the fourth and final denial).

was not attractive enough. Each rime, Plaintiffs would go back and come back with a new drawing. Each time, Defendant would say the wall still wasn't good enough, *but Defendant would not say why. It is obvious that* Defendant was not going to approve Plaintiffs' plans, regardless of what Plaintiffs did.

Also, the evidence clearly showed that CAB and Council approved completely blank walls in the past, even in the same neighborhood as Plaintiffs' property. The evidence showed the recently-built Caravelle parking garage, which is in close proximity to Plaintiffs' property and in the same neighborho d, had a completely "blank" 25 foot wall.[61] Neither the CAB nor Council gave any reason why Plaintiffs were being singled out and required to do more than other developers who were recently allowed to have completely blank walls in the same neighborhood.

Furthermore, without knowing what Defendant didn't like about the wall or Plaintiffs' proposed decorative changes, any effort by Plaintiff to make the wall "visually appealing" is futile. Therefore, the second reason relied on by City Council in denying Plaintiffs' plans is also arbitrary, subjective, without evidentiary support, and again in flagrant disregard for the Supreme Court's *Peterson* holding.[62]

Third, City Council stated "[t]he proposed location of the solid waste compactor will have an unacceptable visual impact on neighboring properties." Again, as the *Peterson* Court stated, "what one person may find unsightly . . . may be pleasing to another." There is no

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- Transcript of September 3 Hearing, p. 66, ll. 21-23. *See* Plaintiffs' Exhibit 21, which clearly shows the Caravelle parking garage with a completely blank wall. As stated above, the Caravelle parking garage is just a block away from Plaintiffs' property.

- Defendant did not defend the second reason for denial on appeal.

ordinance that directs where dumpsters or compactors have to be located on a piece of property in the City. If there were an ordinance stating "no compactor may be viewable from an adjoining lot," then rejecting a project for this reason would be an objective reason Defendant could rely on when denying CAB approval. There is no ordinance to this effect, however, making this alleged reason yet another arbitrary and subjective reason for denial in flagrant disregard for the Supreme Court's *Peterson* holding.

Also, whether some Sea Mark Tower residents can see Plaintiffs' garbage dumpster is not a valid reason for denying CAB approval. Defendant did not put forth any evidence of a better place to put the dumpster. Plaintiffs are required to have a dumpster on site, and Plaintiffs placed the dumpster in the most logical spot on the property, making it accessible to City sanitation workers and trucks, and Plaintiffs placed additional landscaping around the dumpster to conceal it as much as possible.[63] The Sea Mark Tower residents live in a high rise, and of course the dumpster (on the ground) will be visible by some of them, especially those residents on the upper floors.

If Defendant's first three reasons for denial are valid, any project can be denied for any reason and Defendant is not accountable to anyone, even the courts. Plaintiffs presented several different exhibits concerning the placement of the dumpster. If Defendant did not like the placement of the dumpster, it was required to tell Plaintiff where to place the dumpster on the lot so as to receive approval. Defendant should have found out what Sea Mark residents objected to the placement of the dumpster, and looked for an alternative place for the dumpster so that it would not be objectionable to those

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[63] *See, e.g.*, Plaintiffs' Exhibit 45.

specific residents. As a practical matter, it does not appear to matter where the dumpster is located on the lot - - Defendant will continue to deny approval regardless of where the dumpster is placed. Thus, Defendant's third reason is another arbitrary and subjective reason for denial in flagrant disregard for the Supreme Court's *Peterson* holding.[64]

Finally, Defendant stated that "[t]he available evidence did not adequately address the possible effects of storm water design or ground water on the adjacent swash." This alleged reason is wholly without evidentiary support, and is therefore arbitrary and an abuse of discretion. The **only** evidence in the record is that Plaintiffs' storm water management plan complies with all City ordinances. In fact, the Department of Interior issued a letter applauding Plaintiffs' storm water plans, and specifically stated Plaintiffs' plans would be beneficial to the adjacent Cane Patch Swash. Defendant presented **no** evidence that Plaintiffs' plans would have any negative impact on the Swash, or why Plaintiffs must be singled out to unilaterally exceed the City's own storm water management requirements. This reason is clearly an abuse of discretion and without any evidentiary support.[65]

These alleged "reasons" are why our Supreme Court unequivocally states that a project can not be denied for arbitrary, subjective, or purely aesthetic reasons. The CAB ordinance can not be relied on as a tool to stop legal development. Defendant's denial disregards the specific mandate from the South Carolina Supreme Court in the *Peterson* case-Defendant can not deny a project for arbitrary and subjective reasons, and not give a land owner any objective guidance as to what it would have to

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- Defendant did not defend the third reason for denial on appeal.

- Defendant did not defend the fourth reason for denial on appeal.

do to get approval. If this project were "unsightly," or "inharmonious" as Defendant alleges, Plaintiffs would not have already sold all 98 units. The fact that all units were presold clearly shows a large group of people think very highly of this project. Plaintiffs' building is not a giant purple hot dog-shaped building with sparklers, spotlights, and noise makers attached. It is a quality, thoughtful building designed by the most respected architect in the area, and which City staff has approved. Without objective, nonarbitrary reasons for denial, a land owner can develop their property in accordance with existing ordinances.

The subject property is zoned for this project, and there are over a hundred identical projects up and down the Grand Strand. If Defendant wants to stop or control development in Myrtle Beach, it must proactively change the zoning ordinance. Defendant can not decide to stop development in an arbitrary, subjective, or haphazard manner, and give vague, ambiguous, and meaningless reasons to deny projects that comply with the City's ordinances. Plaintiffs are not required to arbitrarily lose their rights because some residents do not want to lose their ocean view or Defendant wants to control growth in a manner that is solely within their discretion.

Also, the CAB does not have the authority to disregard the opinions of City staff who are charged with carrying out City ordinances. The CAB (and City Council when sitting as the CAB on appeal) can not create its own zoning ordinances, or subjectively implement its goals and ideals while disregarding the existing City code and City staff. Section 604.3 of the CAB Ordinance specifically states the CAB "shall not have the authority to . . . modify . . . the requirements of any . . . applicable city ordinance." Thus, Defendant can not, for example, arbitrarily require Plaintiffs adopt a more restrictive storm water management plan than any one else in the City; nor can Defendant tell Plaintiffs that although the

City code requires a 25 foot solid wall on parking garages, Defendant arbitrarily doesn't approve of Plaintiffs' 25 foot solid wail. Defendant has passed a storm water management plan that applies to everyone, and Defendant requires a 25 foot solid wall on parking garages that abut a residential area. Defendant can not now arbitrarily and subjectively change those requirements to appease some members of the community at Plaintiffs' expense.

Defendant argued on appeal that it followed *Peterson* in that it applied the specific standards and criteria in Section 604 rather than just relying on the broad objectives in Section 601.2. Defendant argued that *Peterson* goes no further and should not be relied on for any other proposition. Defendant's argument is misplaced. The South Carolina Supreme Court ruled Defendant's CAB denial in *Peterson* was arbitrary and subjective. It does not matter what alleged ordinance section Defendant relies on, Defendant still can not be arbitrary and subjective. Under Defendant's argument, it can be arbitrary and subjective if it relies on the proper ordinance. That is clearly not the case.

Plaintiffs' Exhibits 38 and 39, along with the multiple statements by the opponents and City Council members, show these appeals are not about the specifics of Plaintiffs' plans. Plaintiffs' Exhibit 38 states

> The board, in upholding their promises to the neighborhood, has rejected the project for a number of reasons that relate to architectural plans **but most importantly, because of opposition from our neighbors.** The Visioning Process showed that our major area of concern is commercial encroachment into our residential areas. The proposed project would create a dangerous precedent in allowing high rise transient accommodations to be built West of

> Ocean Blvd. The 'Domino effect' this will create will be inevitable.

Plaintiffs' Exhibit 39 clearly states the community's motive in blocking this project: "Developers are scrambling to get their projects approved **before we, the people, have the zoning laws changed so that this can't happen to us in the future.**"

The South Carolina Supreme Court has clearly held, as well as all other courts, that a building permit can not be denied for arbitrary, unreasonable, or subjective reasons.[66] It is per se arbitrary and unreasonable to deny a property owner the ability to use his property in any legal fashion.[67] As repeatedly stated above, Plaintiffs' property is zoned for a high rise, so a high rise on the property is clearly not prohibited by law. Also, it is undisputed that Plaintiffs' plans comply with the City code, and a project can not be denied when it complies with the city code.[68]

Other courts have considered what are valid or insufficient grounds for denying a building permit. Among the reasons relied on by cities to deny a project, which courts have specifically found to be illegal, are:

1. Plans would cause more traffic in area;[69]

2. Plans would obstruct a view;[70]

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[66] *See* McQuillen, Municipal Corporations, 3rd ed., § 26.211.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] The remaining examples are from McQuillen, *id.*, § 26.211.60, entitled "Insufficient Grounds for Denial."

3. New project would be "noisy";

4. Plans would cause overcrowding in the area;

5. Complaining party did not like types of windows to be used on new project;

6. Residents or adjoining property owners complained;

7. Proposed use does not fit within "Comprehensive Plan" (because Plan is not an ordinance);

Ironically, each of the reasons just cited (except for the windows), was either directly relied or discussed by the CAB, Council, or the opponents to the project. Even cumulatively, however, these are illegal grounds for rejecting a project that otherwise complies with the zoning ordinances in place at the time of the application.4

To deny a project based solely on the subjective and arbitrary whims of the CAB and City Council goes against the clear holding in *Peterson* and basic due process, equal protection, and Fifth Amendment law. If Defendant's actions are allowed to stand, CAB or Council can deny any project for any reason, regardless of its ordinances. This includes denying a project for purely personal, political, or financial reasons by simply stating the project "is not compatible with existing buildings in the neighborhood." Defendant must have clear, specific objectives to apply, and apply them in a nonarbitrary, nonsubjective manner. As our Supreme Court held in *Peterson,* and as other courts have held,[71] purely aesthetic reasons are too arbitrary and subjective to deny a building permit. Defendant must apply the CAB

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[71] See, e.g., White Advertising Metro, Inc. v. The Zoning Hearing Bd. of Susquehanna Township, 453 A.2d 29 (Pa. 1982).

ordinance and criteria objectively, and give applicants objective, nonarbitrary reasons for denial.

Also, Defendant can not allow the CAB or Council to delegate its police or zoning power to adjoining property owners that oppose a particular project.[72] The fact that some people object is not a reason to deny a project.

The CAB's and City Council's denials must be reversed because they are arbitrary, subjective, without any evidentiary support, an abuse of discretion, and a pretense to stop development. The *Peterson* Court reversed the trial judge because he did not remand the billboard applications to the City for further deliberations, **nor in the alternative did he apply the criteria of the CAB Ordinance to justify issuing approval.**[73]

Remanding this action back to Defendant for further proceedings would be futile. Plaintiff has already appeared before the CAB on three occasions, and City Council on two occasions. Even though City Council was presented with 28 exhibits on one occasion and 47 on the other, it did not review the evidence and ironically denied Plaintiffs' plans for the same reasons both times even though the evidence was different. Council rejected Plaintiffs' plans on two separate occa[illegible]ns for the **exact** same reasons despite the uncontroverted evidence rebutting the previous denials. Also, Defendant refuses to give Plaintiffs any guidance as to what chang[illegible] would need to be made in order to get approval, even though Plaintiffs went through the CAB process a second time in a good faith effort to address Defendant's concerns. Clearly, neither CAB nor City Council is going to change

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[72] *Williams v. Whitten*, 451 S.W.2d 535 (Tex. Civ. App. 1970).

[73] Peterson, supra at 634.

its mind, or objectively consider any variation of Plaintiffs' plans.

Requiring Plaintiffs to appear again before the CAB and City Council would simply be an exercise in futility, and Plaintiff would immediately be back before this Court. Also, each submission is a costly venture for Plaintiffs, and without objective, nonarbitrary reasons for denial it is impossible for Plaintiffs to even know what changes even need to be made to the plans in order to get CAB approval. Therefore, the Court has thoroughly reviewed the evidence, applied the specific CAB criteria and standards in an objective fashion, and orders Defendant give CAB approval based on the plans and exhibits introduced at the November 10,1998 hearing before City Council.

City Zoning Ordinance § 604, entitled "Criteria and Standards," lists the criteria to be objectively utilized by Defendant when reviewing a project. Section 604 specifically states the standards are not meant to be inflexible or intended to discourage creativity, invention, or innovation. Section 604.1.1, entitled "Preservation of landscape," states "[t]he landscape shall be preserved in its natural state, in so far as is practicable, by minimizing tree and soil removal, and any grade changes shall be in keeping with the general appearance of neighboring developed areas." Plaintiffs' property is zoned for approximately 400 units, but Plaintiff only proposes to build 98 units. The footprint of the building on the lot is much less than is allowed under the City's ordinances. Also, the total landscaping for the project is over 157% (47,782 sq. ft.) of the minimum required under the City code. Further, there is no evidence in the record of any grade changes in the plans. Plaintiffs' plans preserve the landscape in its natural state as far as is practicable, tree and soil removal is minimized, and there was no evidence of any grade changes. Plaintiffs' plans therefore meet and exceed all City code requirements and standards relevant

to Section 604.1.1. Defendant, in fact, did not argue on appeal that Plaintiffs' plans violated any criteria in Section 604.1.1.

Section 604.1.2, entitled "Relation of proposed buildings to environment," states the "[p]roposed structures shall be related harmoniously to the terrain and to existing buildings in the vicinity that have a visual relationship to the proposed buildings." Plaintiff complied with the CAB's August 6 concern relating to the rear elevation in the back of the building, making the building relate harmoniously to the terrain. The only other evidence in the record offered by the opponents that relates to this section is listed on the first CAB disapproval form,[74] where the CAB circled "604.1.2" and stated the "height of structure blocks view for permanent residence [sic], existing building." There is no easement of view in South Carolina, however, and Kit Christopher (who developed the Sea Mark Tower) stated no Sea Mark resident was ever promised an ocean view. Also, it is undisputed that Plaintiffs only propose a 14-story building, and the property is zoned to allow a 15-story building.

Further, this is not the first high rise in Myrtle Beach, this area, or this block. The Sea Mark Tower is directly west of (behind) the St. John's. There are also four high rises directly east of (in front of) the St. John's Inn, including the Patricia Grand North, Carolina Dunes, the Beach House condominiums, and the Caravelle.[75] And it is beyond dispute that there are high rises up and down the Grand Strand. Any argument that a high rise is somehow not harmonious with other development on the Grand Strand, this area, or this block, is against the clear

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[74] *See* Attachment to Plaintiffs' Exhibit 8.

[75] *See* Plaintiffs' Exhibits 6 and 21 for excellent overhead views of the area, showing the multiple high rises in this area.

and uncontroverted evidence. All the evidence in the record shows Plaintiffs' plans satisfy the criteria in Section 604.1.2, and Defendant did not present nor point out any objective evidence in the record to the contrary.

Section 604.1.3, entitled "Drives, parking and circulation," states that

> With respect to vehicular and pedestrian circulation, including walkways, interior drives, and parking, special attention shall be given to the number of access points, general interior circulation, separation of pedestrian and vehicular traffic, and arrangement of parking areas that are safe and convenient and, in so far as is practicable, do not detract from the design of the proposed buildings and structures and the neighboring properties.

The only evidence in the record that relates to this criteria was listed on the first CAB Disapproval Form, which stated the only ingress and egress was on 69th Avenue, and that there were no sidewalks on the property for pedestrians. Plaintiff specifically showed the first statement to be incorrect, and added a sidewalk for pedestrians. These issues were never raised again, and are not at issue in these appeals. All the evidence thus shows that Plaintiffs' plans satisfy the criteria in Section 604.1.3, Defendant, in fact, did not argue on appeal that Plaintiffs' plans violated any criteria in Section 604.1.3.

Section 604.1.4, entitled "Surface water drainage," states "[s]pecial attention shall be given to proper site surface drainage so that removal of surface waters will not adversely affect neighboring properties or the public storm drainage system." All the evidence shows Plaintiffs' plans will actually be beneficial to the area and the adjacent Cane Patch Swash. On the other hand, there was absolutely no evidence in the record showing

Plaintiffs' storm water management plan is inadequate in any way. Although several opponents expressed concern about the adjacent Swash, that concern is speculation, not evidence. City staff approved Plaintiffs' plan, and the Department of Interior commended the plan. Defendant did not cite any evidence showing Plaintiffs' project would have any adverse effect on the environment. Defendant, in fact, did not argue on appeal that Plaintiffs' plans violated any criteria in Section 604.1.4.

There is not a shred of evidence in the record to support Defendant's denial or concerns on this issue, yet City Council continued to rely on alleged "storm water management" deficiencies as a reason for denial. At the October 1 CAB hearing, CAB members Bates, Stocks, and Rothrock pointed out that storm water management was never a CAB concern because it was an engineering decision of City staff, and the CAB never rejected a plan for this reason.[76] Defendant put forth no scientific or technical evidence to rebut the overwhelming evidence that Plaintiffs' plans were environmentally friendly and would not harm the adjacent swash.

Section 604.1.7,[77] entitled "Special features," states

> Exposed storage areas, exposed machinery installations, service areas, truck loading areas, utility buildings, and structures and similar accessory areas and structures shall be subject to

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[76] Partial Transcript of October 1 CAB Hearing, pp. 49-51 (Plaintiffs' Exhibit 31).

[77] There is no evidence in the record relating to Section 604.1.5, entitled "Utility service," Section 604.1.6, entitled "Advertising features," or Section 604.1.8, entitled "Application of design standards." Also, none of these sections were relied on by Defendant as a reason in for any denial. Therefore, these sections were not at issue in these appeals, nor did the Court find any evidence in the record that could even be construed to fall under any of these sections.

> such setbacks, screen plantings, or other screening methods as shall reasonably be required to prevent their being incongruous with the existing or contemplated environment and the surrounding properties.

The only evidence in the record that falls within this section is the trash compactor and the wall on the parking garage. These are technically not issues because Plaintiffs stated they will do whatever Defendant wanted concerning the trash compactor and the wall. As stated above, Defendant did not even suggest a better place for the garbage dumpster. Given that: 1) Plaintiffs have to have a dumpster on site; 2) the dumpster would be visible to someone regardless of where it is placed on the property; 3) City staff approved where Plaintiffs' proposed to place the dumpster, 4) the dumpster is placed in the most accessible place for City sanitation workers and trucks; and 5) Defendant did not suggest a better or alternative location, the Court finds the plans for the dumpster as shown on Plaintiffs' Exhibit 45 is the ideal location for the dumpster and the location that best satisfies the criteria in Section 604.1.7. Similarly, the final version of the parking garage wall presented to City Council in Plaintiffs' Exhibit 47 clearly satisfies the criteria in Section 604.1.7. There was no other evidence in the record that would be applicable to Section 604.1.7.

Finally, the Court thoroughly considered the objectives of Section 601, as it is required to do under Section 604.2, in relation to Plaintiffs' plans and the other evidence in the record. The Court did not find any objective, nonarbitrary evidence in the record that would in any way be violative of the objectives in Section 601.2. Further, Defendant did not rely on the objectives of 601.2 on appeal as valid reasons for denial.

Therefore, the evidence in the record shows Plaintiffs' plans must receive CAB approval, and that there was no objective, nonarbitrary reason not to do so.

III.CONCLUSION

For the reasons above, Defendant's denial of CAB approval is reversed because the denials were arbitrary, subjective, without evidentiary support, an abuse of discretion, merely a pretense to stop development, and a denial of Plaintiffs' due process and equal protection rights.

The Court has also thoroughly reviewed the evidence and applied the specific criteria in the CAB Ordinance. The evidence clearly shows that Plaintiffs' plans satisfy the criteria in the CAB Ordinance, and that there is no objective, nonarbitrary reason for Defendant to deny CAB approval. Further, Plaintiffs' second attempt to get CAB approval and Defendant's actions relating to that second attempt show that any other submissions by Plaintiffs would be futile. The Court therefore orders that Defendant grant Plaintiffs CAB approval based on the plans submitted to City Council on November 10, 1998.

IT IS SO ORDERED!

/s/ J. Stanton Cross, Jr.
Hon. J. Stanton Cross, Jr.
Horry County Master-In-Equity

Conway, South Carolina.

May 13, 1999.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED September 23, 2005

No. 04-2171
CA-99-132-12

SUNRISE CORPORATION OF MYRTLE BEACH;
BOULEVARD DEVELOPMENT LLC;
S&H DEVELOPMENT INC.

Plaintiffs - Appellants

v.

THE CITY OF MYRTLE BEACH;
MARK MCBRIDE, Individually;
JUDY RODMAN, Individually;
RACHAEL BROADHURST, Individually;
CHARLES MARTINO, Individually;
WILSON CAIN, Individually;
CRAIN WOODS, Individually;
LARRY BRAGG, Individually;
TOM CONN, Individually;
TOM DAVIS, Individually;
SALLY HOWARD, Individually;
FRED ROURK, Individually

Defendants – Appellees

[ENTERED: September 23, 2005]

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Widener, Judge Wikinson, and Judge Niemeyer.

For the Court,

/s/ Patricia S. Connor
CLERK

5th Amendment, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

14th Amendment, United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Article IV § 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

28 U.S.C. § 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

42 U.S.C. § 1983 (2004)
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

S.C. Code § 16-5-60 (2003)

Any citizen who shall be hindered, prevented or obstructed in the exercise of the rights and privileges secured to him by the Constitution and laws of the United States or by the Constitution and laws of this State or shall be injured in his person or property because of his exercise of the same may claim and prosecute the county in which the offense shall be committed for any damages he shall sustain thereby, and the county shall be responsible for the payment of such damages as the court may award, which shall be paid by the county treasurer of such county on a warrant drawn by the governing body thereof. Such warrant shall be drawn by the governing body as soon as a certified copy of the judgment roll is delivered to them for file in their office.

S.C. Code § 16-5-60 (2003) (*entitled*, "Suits against county for damages to person or property resulting from violation of person's civil rights")

S.C. Code § 6-29-800 (Supp. 2004)

(A) The board of appeals has the following powers:

(1) to hear and decide appeals where it is alleged there is error in an order, requirement, decision, or determination made by an administrative official in the enforcement of the zoning ordinance;

(2) to hear and decide appeals for variance from the requirements of the zoning ordinance when strict application of the provisions of the ordinance would result in **unnecessary hardship**. A variance may be granted in an individual case of unnecessary hardship if the board makes and explains in writing the following findings:

(a) there are **extraordinary and exceptional conditions** pertaining to the particular piece of property;

(b) these conditions **do not generally apply to other property in the vicinity**;

(c) because of these conditions, the application of the ordinance to the particular piece of property would **effectively prohibit or unreasonably restrict** the utilization of the property; and

(d) the authorization of a **variance will not be of substantial detriment** to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

(i) The board **may not** grant a variance, the effect of which would be to **allow the establishment of a use not otherwise permitted** in a zoning district, to extend physically a nonconforming use of land or to change the zoning district boundaries shown on the official zoning map. The fact that property may be utilized more profitably, if a variance is granted, may not be considered grounds for a variance. Other requirements may be prescribed by the zoning ordinance.

A local governing body by ordinance may permit or preclude the granting of a variance for a use of land, a building, or a structure that is prohibited in a given district, and if it does permit a variance, the governing body may require the affirmative vote of two-thirds of the local

adjustment board members present and voting. Notwithstanding any other provision of this section, the local governing body may overrule the decision of the local board of adjustment concerning a use variance.

(ii) In granting a variance, the board **may attach to it such conditions** regarding the location, character, or other features of the proposed building, structure, or use as the board may consider advisable to protect established property values in the surrounding area or to promote the public health, safety, or general welfare;

(3) to permit uses by special exception subject to the terms and conditions for the uses set forth for such uses in the zoning ordinance; and

(4) to remand a matter to an administrative official, upon motion by a party or the board's own motion, if the board determines the record is insufficient for review. A party's motion for remand may be denied if the board determines that the record is sufficient for review. The board must set a rehearing on the remanded matter without further public notice for a time certain within sixty days unless otherwise agreed to by the parties. The board must maintain a list of persons who express an interest in being informed when the remanded matter is set for rehearing, and notice of the rehearing must be mailed to these persons prior to the rehearing.

(B) Appeals to the board may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality or county. The appeal must be taken within a reasonable time, as provided

by the zoning ordinance or rules of the board, or both, by filing with the officer from whom the appeal is taken and with the board of appeals notice of appeal specifying the grounds for the appeal. If no time limit is provided, the appeal must be taken within thirty days from the date the appealing party has received actual notice of the action from which the appeal is taken. The officer from whom the appeal is taken immediately must transmit to the board all the papers constituting the record upon which the action appealed from was taken.

(C) An appeal stays all legal proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board, after the notice of appeal has been filed with him, that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life and property. In that case, proceedings may not be stayed other than by a restraining order which may be granted by the board or by a court of record on application, on notice to the officer from whom the appeal is taken, and on due cause shown.

(D) The board must fix a reasonable time for the hearing of the appeal or other matter referred to the board, and give at least fifteen days' public notice of the hearing in a newspaper of general circulation in the community, as well as due notice to the parties in interest, and decide the appeal or matter within a reasonable time. At the hearing, any party may appear in person or by agent or by attorney.

(E) In exercising the above power, the board of appeals may, in conformity with the provisions of this chapter, reverse or affirm, wholly or in part, or may modify the order, requirements, decision, or determination, and to that end, has all the powers of the officer from whom the appeal is taken and may issue or direct the

issuance of a permit. The board, in the execution of the duties specified in this chapter, may subpoena witnesses and in case of contempt may certify this fact to the circuit court having jurisdiction.

(F) All final decisions and orders of the board must be in writing and be permanently filed in the office of the board as a public record. All findings of fact and conclusions of law must be separately stated in final decisions or orders of the board which must be delivered to parties of interest by certified mail.

S.C. Code § 6-29-800 (Supp. 2004) (*entitled* "Powers of board of appeals; variances; special exceptions; remand; stay; hearing; decisions and orders").

RECORD NO. 04-2171

In The
United States Court of Appeals
For The Fourth Circuit

SUNRISE CORPORATION OF MYRTLE BEACH;
BOULEVARD DEVELOPMENT LLC;
S&H DEVELOPMENT INC.,
Plaintiffs – Appellants,

v.

THE CITY OF MYRTLE BEACH;MARK McBRIDE;
JUDY RODMAN; RACHAEL BROADHURST;
CHARLES MARTINO; WILSON CAIN; CRAIN WOODS;
LARRY BRAGG; TOM CONN; TOM DAVIS;
SALLY HOWARD; FRED ROURK, Individually,
Defendants – Appellees.

[ENTERED: September 9, 2005]

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF
SOUTH CAROLINA AT FLORENCE

APPELLANTS' PETITION FOR REHEARING AND PETITION FOR REHEARING *EN BANC*

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I. Statement of Purpose of Rehearing

Pursuant to the Rule 40 of the *Federal Rules of Appellate Procedure*, Appellants hereby petition this Honorable Court for rehearing. Appellants' respectfully submit their grounds for rehearing are as follows: (1) That the decision of the Court overlooked material facts and issues of law; (2) That the opinion of the Court is in conflict with a decision of the United States Supreme Court, the Court of Appeals for the Fourth Circuit, other courts of appeals, as well as the final judgment issued in the state court in this same matter and these conflicts are not addressed in the opinion; and (3) The proceeding involves a question of exceptional importance.

II. Statement of Purpose for Rehearing En Banc

Pursuant to the Rule 35 of the *Federal Rules of Appellate Procedure*, Appellants hereby petition this Honorable Court for rehearing en banc. Appellants respectfully submit that en banc consideration is necessary to establish the conformity of this Honorable Court's precedent with the binding authority and direction of the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit, as well as other Circuit Courts of Appeals.

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[1] *Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198 (2003) (governmental behavior relevant in the land-use context).

[2] *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983)(South Carolina recognizes a vested right upon good faith reliance on the right to use property).

[3] *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592 (3d Cir. 1995); *River Park v. Highland Park*, 23 F.3d 164 (7th Cir. 1994).

STATEMENT OF ISSUES FOR REHEARING

1. **The Court's Decision misapprehended the Doctrine of Res Judicata by applying the decision of the South Carolina Court of Appeals instead of the State's Trial Court Order, without any justification or rationale, where the State Court of Appeals only reviewed the State Trial Court Order under an "any evidence" standard of review, and affirmed the State Trial Court Order without Modification.**

2. **The Court's Decision completely fails to address the doctrine of Collateral Estoppel, and by so doing, makes findings of fact that directly conflict with the State Trial Court Order, and fails to recognize that issues actually decided, at a minimum, are competent evidence as to Appellants' due process, and equal protection claims**

3. **The Court's Decision incorrectly states that Appellants "abandoned the claims against the individual defendants," whereas during oral argument Counsel for Appellants only stated that the Individual Appellees would not be bound by the Doctrine of Res Judicata.**

4. **The Court's Decision denying Appellants' equal protection claim relies on the findings of fact made by the Appellee's City Council and therefore overlooks the State Trial Court's findings that were affirmed on appeal, that the reasoning and justifications of the Appellee City at every stage of the process were only a pretext to intentionally and completely stop any high rise development on Appellants' property.**

5. **The Court's Decision denying Appellants' takings claim states that Appellants had "no right" to proceed with development until aesthetic approval was given and is therefore contrary to well settled South Carolina Law as recognized by precedent of this Honorable Court, where Appellants had a vested right to an expressly permitted use of their property, where Appellants reasonably relied on the Appellee's City's ordinances in good faith, and where in so doing Appellants incurred substantial damages.**

STATEMENT OF ISSUES FOR REHEARING & REHEARING EN BANC

1(A) **The Court's Decision dismissing Appellants' due process claim overlooks all of the Fourth Circuit Court of Appeals' previous jurisprudence regarding the entitlement test in the due process context, which was the entire reasoning of the District Court's decision below, which is contrary to binding authority and direction of the United States Supreme Court, decision of the United States Court of Appeals for the Fourth Circuit, as well as other Circuit Courts of Appeals.**

2(B) **The Court's reasoning in dismissing Appellants' due process claims directly contradicts controlling precedent of the United States Supreme Court, as well as this Honorable Court's due process jurisprudence, whereas the Decision does not discuss the entitlement test, but instead states that due process must have existed where Appellee City eventually was forced to provide a permit to the Appellants, where**

Appellants suffered not only costs but rather extensive damage, and where the state Trial Court Order's express holdings related to due process are, at a minimum, clear and competent evidence to generate a question of fact as to whether Appellants actually received due process.

ARGUMENT

1. **The Court's Decision misapprehended the Doctrine of Res Judicata by applying the decision of the South Carolina Court of Appeals instead of the State's Trial Court Order, without any justification or rationale, where the State Court of Appeals only reviewed the State Trial Court Order under an "any evidence" standard of review, and affirmed the State Trial Court Order without Modification.**

The Court's Decision correctly states that after a full trial in the state court, Appellee City's actions were found to be: (1) arbitrary, (2) subjective, (3) without evidentiary support, (4) an abuse of discretion, (5) merely a pretense to stop development, **(6) a denial of Plaintiffs' due process and equal protection rights, and (7) contrary to Fifth Amendment law.**[4] Subsequently, this Order was appealed to the South Carolina Court of Appeals.

In footnote number 6 of the Court's decision, without any rationale or justification, this Honorable Court states the South Carolina Court of Appeals decision is the only one that will be given any preclusive consideration. Respectfully, this is an error of law, because the South

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[4] Trial Court Order, Joint Appendix (J. App) at 13, 37, 43 (emphasis added).

Carolina Court of Appeals had narrowed the questions presented to a very limited "any evidence" standard of review:

> These five stated issues essentially present two arguments. First, did the trial court err in reversing city council's decision because **there is evidence in the record to support the decision**? Second, did the trial court err in substituting its judgment for that of the City Council?.[5]

The State Court of Appeals answered the first question in the affirmative, and importantly, went on to state that the City's actions were totally unjustified and illegal.

The South Carolina Court of Appeals affirmed the Trial Court Order without any modification.[6] Respectfully, under 28 U.S.C. § 1738, this Court may not infer that the South Carolina Court of Appeals actually modified, amended, or vacated the conclusions and findings of the state Trial Court, when it **expressly held**:

> Based upon our review of the trial judge's findings, we find no error. The decision of the trial court is **AFFIRMED.**

Res judicata is founded on the principle of stare decisis, and its application avoids inconsistent verdicts and promotes fairness.[7] This Honorable Court's decision in

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[5] Court of Appeals, J. App at 222 (emphasis added).

[6] *Boulevard Dev. v. Myrtle Beach*, Op. No. 2001-UP-091 (filed Feb. 13, 2001), J. App. at 216-225.

[7] *Plum Creek Dev. Co., v. Conway*, 334 S.C. 30, 34, 512 S.E.2d 106 (1999).

this matter is absolutely inconsistent, and an impermissible collateral attack upon, the decision entered by the state trial court, and affirmed in toto by the South Carolina Court of Appeals.

The City was obligated to request any clarification, as well as raise any and all applicable issues and defenses pertaining to Due Process, Equal Protection, and Takings law in the state courts. The sole question this Honorable Court has to decide is whether the courts of South Carolina would be bound by the Order entered on May 13, 1999, after the trial of this matter, would be bound by the express holdings therein.

2. The Court's Decision completely fails to address the doctrine of Collateral Estoppel, and by so doing, makes findings of fact that directly conflict with the State Trial Court Order, and fails to recognize that issues actually decided, at a minimum, are competent evidence as to Appellants' due process, and equal protection claims.

Even if this Honorable Court were to hold that res judicata does not apply despite the express holding of the Trial Court, findings of fact as to these issues are not only evidence which must be viewed in the light most favorable to Appellants as the non-moving party, these issues were actually litigated and are the law of the case which Appellees should have been collaterally estopped from contesting.

Respectfully, this Honorable Court's Decision in this matter overlooks the lists of numerous findings made by the Trial Court, after a full trial. These findings are issues that were actually litigated and are conclusive proof there was evidence in the record as to Appellants being similarly situated to numerous oceanfront developers, and were intentionally subjected to an

illegitimate, illegal, and oppressive exercise of power. As such, Appellants' equal protection claim clearly should have survived summary judgment.

Additionally, and respectfully, the Decision of this Honorable Court must address all of the findings of fact made by the Trial Court, which allowed the South Carolina Court of Appeals to determine that the remand of this matter back to the City would be futile.[8]

3. The Court's Decision incorrectly states that Appellants "abandoned the claims against the individual defendants," whereas during oral argument Counsel for Appellants only stated that the Individual Appellees would not be bound by the Doctrine of Res Judicata.

In their Brief and Reply Brief, and subsequently during oral argument, Counsel for Appellants did not argue that the individual Appellees would not be bound by the doctrine of res judicata. At no time, have Appellants asserted that the individual Appellees are not liable for their actions taken under color of state law.

4. The Court's Decision denying Appellants' equal protection claim relies on the findings of fact made by the Appellee's City Council and therefore overlooks the State Trial Court's findings that were affirmed on appeal, that the reasoning and justifications of the Appellee City at every stage of the process were only a pretext to intentionally and completely stop any high rise development on Appellants' property.

The Courts Decision, denying Appellant's equal protection claim, relies on one of the Appellee City

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[8] Ct. of Appeals, J.A. at 425-26.

Council's pre-textual justifications as actual evidence in the record. After trial and weighing the credibility of the evidence on this exact issue, the State Trial Court found:

> City Council stated that "[t]he solid wall on the parking garage is required by City code, but is lacking in architectural features to break the unrelieved visual effect." This reason is also arbitrary and subjective, because as the *Peterson* Court stated, "what one person may find unsightly . . . may be pleasing to another." The wall is attractively decorated and blends well the proposed building. Most important, there is no evidence in the record as to what is wrong with the wall, or what needed to be changed to get City Council's approval. Plaintiffs presented four versions of the wall to Defendant, and Defendant merely said each one was unacceptable. Without specific, objective criteria and reasons as to what was wrong with the wall, Defendants could deny Plaintiffs' plans forever by just saying the wall is unacceptable.[9]

Therefore, this Court's reliance upon Appellants' justifications, found to be "merely a pretense to stop development," is a direct collateral attack on the holding of the state Trial Court Order.

5. The Court's Decision denying Appellants' takings claim states that Appellants had "no right" to proceed with development until aesthetic approval was given and is therefore contrary to well settled South Carolina Law as recognized by precedent of this Honorable Court, where Appellants had a vested right to an expressly permitted use of their property,

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[9] Trial Court Order, J.A. at 29-30.

where Appellants reasonably relied on the Appellee's City's ordinances in good faith, and where in so doing Appellants incurred substantial damages.

This Honorable Court's decision dismissing Appellants taking claim states there could not have been a taking because "they had no right to proceed with the project until they received [Appellee City's] approval." This finding overlooks the precedent of this Court, which has recognized that the citizens of South Carolina have a vested right to the lawful use of their land before permits issue. In *Scott v. Greenville County*, this Honorable Court reasoned:

> Under South Carolina law settled well before he applied for the building permit, Scott enjoyed an entitlement to the issuance of a permit upon presentation of an application and plans showing a use expressly permitted under the then-current zoning ordinance. *Niggel v. Columbia*, 254 S.C. 19, 173 S.E.2d 136, 137-38 (1970); *Pure Oil Division v. Columbia*, 254 S.C. 28, 173 S.E.2d 140, 142 (1970).[10]
>
> ....
>
> [T]he law of South Carolina at that time was, and continues to be, that persons "who have relied in good faith on the right to use property as permitted under zoning ordinances in force at the time application was made" are deemed to have a vested right to a permit not defeasible by the pendency of a lawful rezoning. Sherman, supra, 257 S.E.2d at 737 (*citing Pure Oil, supra*, and *Kerr v. Columbia*, 232 S.C. 405, 102 S.E.2d 364 (1958));

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[10] *Scott v. Greenville County*, 716 F.2d 1409, 1418 (4th Cir. 1983).

see also, Byrd v. City of North Augusta, 261 S.C. 591, 201 S.E.2d 744, 746 (1974)).

The Appellants in this case conferred with the City's planners and were told their project complied with the plans. Based on these representations, Appellants devoted millions of dollars to the project, and:

> Plaintiffs even repeatedly asked Defendant what changes needed to be made to Plaintiffs' plans in order to receive CAB approval, told Defendant they would change whatever Defendant wanted changed, and that money was not an issue (at the time). Defendant, however, refused to even give Plaintiffs any objective guidance as to what would have to be done to obtain CAB approval."[11]

Thus, the City has invented a process that provides them with absolute power to contradict their own ordinances, and in effect invented "a single local ordinance providing that 'we may put your land in any zone we want, for any reason we feel like.'"[12]

Since Appellants had a vested right in the lawful use of their property, this Court the remainder of the *Penn Central* analysis is appropriate, to which Appellants would refer to and incorporate herein the analysis set forth in the Brief and Reply which directs this Court's attention to the holding of the Trial Court, stating the taking of their property was contrary to Fifth Amendment law, and in fact purposefully and intentionally taken.

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[11] Trial Court Order, J.A. at 14.

[12] *River Park v. Highland Park*, 23 F.3d 164, 165-66 (7th Cir. 1994) (internal citations omitted)(emphasis added).

ARGUMENT OF ISSUES FOR REHEARING & REHEARING EN BANC-

1(A) The Court's Decision dismissing Appellants' due process claim overlooks all of the Fourth Circuit Court of Appeals' previous jurisprudence regarding the entitlement test in the due process context, which was the entire reasoning of the District Court's decision below, which is contrary to binding authority and direction of the United States Supreme Court, decision of the United States Court of Appeals for the Fourth Circuit, as well as other Circuit Courts of Appeals.

The District Court for the District of South Carolina recognized that the fundamental issue in this case is whether this Honorable Court's decisions in *Gardner v. City of Baltimore Mayor & City Council*, 969 F.2d 63 (4th Cir. 1992), *Biser v. Town of Bel Air*, 991 F.2d 100 (4th Cir. 1993) and *Sylvia Dev. Corp. v. Calvert County, Maryland*, 48 F.3d 810 (4th Cir. 1995), as interpreted and applied by the District Court, directly conflict with precedent and direction from the United States Supreme Court,[14] as well as the decisions of other United States Courts of Appeals that have addressed the issue.[15]

Appellants respectfully object to the Court's avoidance of this fundamental issue which was extensively researched and briefed at great cost. The entire basis for the District Court's dismissal of

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[13] Appellants also reserve the arguments made in its Brief and Reply on this subject, and incorporates those herein by reference.

[14] *Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198 (2003) (behavior was relevant in the land-use context).

[15] *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592 (3d Cir. 1995); *River Park v. Highland Park*, 23 F.3d 164 (7th Cir. 1994)

Appellants due process claim was that the Appellee City had provided itself with very limited discretion, and then used that same discretion to violate Appellant's constitutional rights. On this basis, Appellants respectfully refer to the reasoning specifically and fully set forth in their initial Petition for an En Banc Determination on file with this Court.

2(B) The Court's reasoning in dismissing Appellants' due process claims directly contradicts controlling precedent of the United States Supreme Court, as well as this Honorable Court's due process jurisprudence, whereas the Decision does not discuss the entitlement test, but instead states that due process must have existed where Appellee City eventually was forced to provide a permit to the Appellants, where Appellants suffered not only costs but rather extensive damage, and where the state Trial Court Order's express holdings related to due process are, at a minimum, clear and competent evidence to generate a question of fact as to whether Appellants actually received due process.

The Court's Decision states that Appellants "received the very remedy they sought, the permit to develop the property," and therefore due process must have existed. This proposition is inaccurate because it essentially assumes that the only harm or damage that can come to a developer is the cost of five years worth of legal fees. In stark contrast, Appellants presented competent evidence showing that the City's actions took them to the brink of financial disaster, whereas they were forced to sell portions of the property to avoid bankruptcy.[16] These

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[16] Damages Brochure, J.A. at 488.

damages were the part of the remedy that Appellants sought, the denial of which was complete and therefore "the State fail[ed] to provide due process."[17]

Additionally, the Court's reasoning is contrary to the holding in the United States Supreme Court's decision in *Monterey v. Del Monte Dunes at Monterey* where the developer "was entitled to proceed in federal court under § 1983 because, at the time of the city's actions, the State of California did not provide a compensatory remedy."[18] Additionally, this Court's jurisprudence has recognized that a constitutional violation has not been remedied simply by permit issuance in *Scott v. Greenville County*,[19] wherein this Honorable Court recognized that even after a the government was willing to issue a permit, the developer had suffered significant damage and "where there is fairly alleged a basis for finding either 'abuse of discretion [or] caprice in [a] zoning administrator's refusal to issue' a building permit, a Fourteenth Amendment claim is properly stated."[20]

This Court's Decision sidestep the opportunity to put a limit "at the outer margins of municipal behavior,"[21] and instead provides all municipalities with the power to inflict bankruptcy on certain individuals. This power simply should not be part of the give and take of the zoning process. Frankly, there has never been a need or a justifiable basis in English law for such an absolute power.

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[17] Opinion at 7.

[18] *Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 710 (1999).

[19] 716 F.2d 1409 (4th Cir. 1983).

[20] *Id.* at 1419.

[21] 969 F.2d 63, 68, 69 (4th Cir. 1992) (emphasis added).

CONCLUSION

Although several technical arguments are in play, this case presents one simple issue. Is a local government free to act however it wants, or is it constrained? Where a state has failed to provide a remedy, the United States Constitution acts as a limit on all governmental behavior. This appeal is not an attack on the amount of deference federal courts give to local governments or the system of zoning itself. Nevertheless, the law as interpreted and applied by the District Court goes too far, and the facts of this case present this Honorable Court with the opportunity to make it right. The entitlement test should not preclude review where discretion is limited and there is evidence of egregious behavior. While every alleged arbitrary and capricious action does not constitute a violation of substantive Due Process, some might, and they must be analyzed appropriately.

Appellants respectfully pray this Honorable court will grant a rehearing to address the issues above, and en banc hearing to consider the true issue in this case, whether abusive and oppressive governmental behavior is relevant, and whether there is a limit to the Fourth Circuit's entitlement test, despite limited discretion, at the outer margins of municipal behavior.

Respectfully submitted,

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September 9, 2005.

RECORD NO. 04-2171

In The
United States Court of Appeals
For The Fourth Circuit

SUNRISE CORPORATION OF MYRTLE BEACH;
BOULEVARD DEVELOPMENT LLC;
S&H DEVELOPMENT INC.,
Plaintiffs – Appellants,

v.

THE CITY OF MYRTLE BEACH;
MARK McBRIDE; JUDY RODMAN;
RACHAEL BROADHURST; CHARLES MARTINO;
WILSON CAIN; CRAIN WOODS; LARRY BRAGG;
TOM CONN; TOM DAVIS; SALLY HOWARD;
FRED ROURK, Individually,
Defendants – Appellees.

[ENTERED: March 7, 2005]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA AT FLORENCE

APPELLANTS' PETITION FOR *EN BANC* DETERMINATION

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Pursuant to the Notice of Session Assignment, dated February 25, 2005, and FRAP, Rule 35, Appellants hereby petition this Honorable Court for an en banc hearing. The fundamental issue is whether this Honorable Court's decisions in *Gardner v. City of Baltimore Mayor & City Council*, 969 F.2d 63 (4th Cir. 1992), *Biser v. Town of Bel Air*, 991 F.2d 100 (4th Cir. 1993) and *Sylvia Dev. Corp. v. Calvert County, Maryland*, 48 F.3d 810 (4th Cir. 1995), as interpreted and applied by the United States District Court for the District of South Carolina, directly conflict with precedent and direction from the United States Supreme Court,[·] as well as the decisions of other United States Courts of Appeals that have addressed the issue.[·]

The District Court below relied on the Fourth Circuit cases cited above to hold that all local zoning decisions are beyond judicial review where a local government has provided itself some amount of "discretion," even where that discretion is substantially limited and even where it is used to intentionally and oppressively deprive a property owner of the expressly lawful use of their property.

Gardner, *Biser*, and *Sylvia*, all dealt with variances or special exceptions, where the zoning ordinances specifically and expressly stated the proposed project was not permissible in the first instance. The case at bar deals with the bad faith denial of a building permit through the intentional and flagrant misuse of a purely aesthetic ordinance to re-zone the property.[·] That is, the City's zoning ordinances specifically and expressly stated that the Developers' project was permissible. Additionally, state law specifically placed a duty upon the City to provide reasons

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[·] *Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198 (2003) (behavior was relevant in the land-use context).

[·] *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592 (3d Cir. 1995); *River Park v. Highland Park*, 23 F.3d 164 (7th Cir. 1994)

[·] Trial Ct. Order, J. App. at 27, 29, 32, 33.

which would inform the developer as to what corrective actions could have been taken in order to receive approval.[·] Appellants were entitled to aesthetic approval, as determined by the South Carolina circuit court, Court of Appeals, and Supreme Court.

While every alleged arbitrary and capricious action does not constitute a substantive due process violation, some might, and they must be provided judicial review. *En banc* consideration is therefore necessary to establish the conformity of this Honorable Court's precedent with the binding authority and direction of the United States Supreme Court and the decisions of other Circuit Courts of Appeal.

I. Brief Factual Summary

In 1996, Appellants (hereinafter "Developers") were formed to buy and develop certain property in Myrtle Beach, South Carolina. Prior to purchasing the property, the Developers verified that the current the zoning ordinances allowed the construction of an upscale high-rise condominium. Subsequently, the Developers purchased the property and expended hundreds of thousands of dollars to pursue development. The proposed plan conformed to all applicable building codes and zoning ordinances, including every height, density, setback, and use restriction in the City's Code of Ordinances.

The Developers had to submit their plans to a community appearance board (hereinafter "CAB"). "In essence, the CAB's purpose was to ensure that new construction in the City was aesthetically pleasing."[·] Accordingly, the City's CAB ordinances place limits on every

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[·] Trial Ct. Order, J. App. at 13 (*citing Peterson Outdoor Adv. v. Myrtle Beach*, 489 S.E.2d 630 (S.C. 1997).

[·] District Ct. Order, J. App. at 664.

zoning classification. Thus, even though the zoning ordinances expressly permit construction, developers are never entitled to overburden roadways, cause flooding or pollution, or build an architecturally obnoxious building.·

Developers' plans were submitted to and summarily rejected by the CAB on four occasions. The Developer then initiated an action to have the CAB decision overturned along with a parallel 42 U.S.C. § 1983 civil rights action, alleging in both actions that the City's oppressive behavior was a violation of, among other things, their substantive Due Process rights. The Trial Court expressly held that the City's actions were a "flagrant" violation of state law, in that they were (1) arbitrary, (2) subjective, (3) without evidentiary support, (4) an abuse of discretion, (5) merely a pretense to stop development, (6) a denial of Plaintiffs' due process and equal protection rights, and (7) contrary to Fifth Amendment law.·

II. Analysis of the District Court's Decision

Relying on this Honorable Court's precedent in *Gardner*, *Biser*, and *Sylvia*, as to substantive Due Process in the land-use context, the United States District Court for the District of South Carolina held that abusive and oppressive behavior by the City and its CAB was "immaterial."· Since the City had "discretion" in giving CAB approval, this discretion prohibits any judicial review, even if the Developers could prove the City intentionally and flagrantly used the CAB process as a sword to re-zone Developers' property.

·*See* Myrtle Beach Code **Error! Main Document Only.**§ 604, J. App. at 49.

· Trial Ct. Order, J. App. at 13, 27, 29, 32, 33, 37, 43; *aff'd* at 2001-UP-091 (S.C. Ct. App. 2001), J. App. at 216; *cert. dismissed as improvidently granted* at 2002-MO-079 (S.C. 2002), J. App. at 226.

· District Ct. Order, J. App. at 671 ("[I]t is immaterial whether the licensing agency abused its discretion in denying the permit.").

Appellants respectfully submit the District Court either erred in the application of the this Honorable Court's precedent, or this Honorable Court's precedent is contrary to controlling precedent of the United States Supreme Court, and the decisions of other Circuit Courts of Appeals. Where discretion is significantly limited under state law, abusive and oppressive governmental behavior should be relevant. The City can not give itself aesthetic discretion, use that discretion as a sword to intentionally re-zone property in bad faith, and then use that same discretion as a shield to defend against a due process claim.

A. The Fourth Circuit's Entitlement Test

The District Court identified the applicable Fourth Circuit precedent as to substantive Due Process in the land-use context:

> Boulevard's due process claims fail because it did not have a property right ... In the Fourth Circuit, a plaintiff has a property right in a building permit only if 'he has a legitimate claim of entitlement to it.' A plaintiff has a legitimate claim of entitlement to a permit if, 'under state and municipal law, the permitting authority lacks [any significant] discretion to deny issuance of the permit or to withhold its approval.'
>
> The focus of the Court's inquiry into whether a plaintiff has a state-created entitlement to the permit is always on the issuing agency's discretion; ... In other words, **it is immaterial whether the licensing agency abused its discretion in denying the permit.**·

· District Ct. Order, J. App. at 670-71 (emphasis added) (internal citations omitted).

While the Supreme Court has not decided whether the entitlement test should apply where a developer has been subjected to abusive and oppressive behavior by a local government in the land-use context,[8] a majority of the circuit courts of appeal have applied the entitlement standard to resolve these disputes.[9]

While the entitlement test dictates that municipal discretion is important, it should not state that discretion is absolutely dispositive where (1) that same discretion is significantly proscribed under state law, and (2) there is evidence of egregiously oppressive behavior. Accordingly, when this Honorable Court adopted the entitlement test in *Gardner v. Baltimore*,[10] municipal behavior was relevant:

> In **most instances**, ... decisions regarding the application of subdivision regulations, zoning ordinances, and other local land-use controls properly rest with the community that is ultimately-and intimately-affected.
>
> ....
>
> We believe [the entitlement] standard appropriately balances the need for local autonomy in a matter of paramount local concern **with recognition of**

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[8] Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation*, 3 Wash. U.J.L. & Pol'y 61, 65 (2000).

[9] *See Gardner*, 969 F.2d at 68 (*citing Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989); *RRI Realty Corp. v. Vill. of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989); *Carolan v. Kansas City*, 813 F.2d 178, 181 (8th Cir. 1987)); *see also Triomphe Investors v. Northwood*, 49 F.3d 198, 202 (6th Cir. 1995); *Crown Point I, LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1216 (10th Cir. 2003).

[10] 969 F.2d 63, 66-69 (4th Cir. 1992).

> **constitutional protection at the very outer margins of municipal behavior.**[-]

This suggests the entitlement test was supposed to allow for a limit on truly abusive and oppressive governmental behavior. In stark contrast, the District Court's interpretation of the entitlement test dictates that discretion is always dispositive, and **behavior is never relevant**. Thus, the District Court could not balance local autonomy with constitutional protection in any instance, **because discretion has absolutely nothing to do with behavior**. If an entitlement and a property right is based solely on the discretion that a local governmental body has provided itself-a local government may give itself discretion to violate the Constitution.

B. The Constitution and Supreme Court Precedent

The 14th Amendment declares that "[n]o State shall deprive any person of life, liberty, or property, without due process of law."[-] The Due Process Clause's substantive aspect "protects against government power arbitrarily and oppressively exercised."[-] Thus, the Constitution protects citizens from "certain government actions regardless of the fairness of the procedures used to implement them."[-] These principles serve as the foundation for the proposition that flagrantly egregious governmental behavior is relevant in a due process claim.

[-] 969 F.2d 63, 68, 69 (4th Cir. 1992) (emphasis added).

[-] U.S. CONST. AMEND. XIV, ' 1.

[-] *Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (*citing Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

[-] *Id.* at 840 (*quoting Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

Accordingly, the Supreme Court has "emphasized time and again that 'the touchstone of due process is protection of the individual against arbitrary action of government.'"[8] In a due process challenge to municipal action, the question is whether the governmental behavior is egregious and outrageously oppressive:[9]

> The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. But the zoning power is not infinite and unchallengeable; it "must be exercised within constitutional limits." Accordingly, it is subject to judicial review.[10]

The federal courts should be able to scrutinize outrageous governmental behavior, yet the District Court's interpretation of the entitlement test precludes any review and thereby provides a local government with a license to ignore the Constitution. Appellants respectfully submit that this cannot be the law.

C. Criticism of the Entitlement Test

Criticisms of the entitlement test in the land-use context are not hard to find or understand, and the District Court's application of Fourth Circuit precedent, respectfully, justifies this disapproval. The first, and most fundamental problem with the entitlement test B as well as the

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[8] *Sacramento v. Lewis*, 523 U.S. 833, 845 (1998).

[9] *See Sacramento v. Lewis*, 523 U.S. 833, 847 (1998); *see also Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198 (2003) (behavior was the dispositive factor in the Supreme Court's review in the land-use context).

[10] *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (*quoting Moore v. East Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., concurring in judgment)).

foundation of it B is the characterization of the lawful use of property as a governmental benefit. The reasoning behind this classification is not intuitive,[•] and while Fourth Circuit has not confronted this logical inconsistency, other circuit courts of appeal have:

> [O]wnership is a property interest worthy of substantive due process protection. Indeed, one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership. ....
>
> [W]e are less certain [than other circuits] that the "legitimate claim of entitlement" approach is mandated by Supreme Court jurisprudence. [A] property interest within the meaning of the Fourteenth Amendment includes not only what is owned but also, in some limited circumstances, what is sought.[▪]

The Seventh Circuit also rejected the classification of ownership of property as a governmental benefit with the following thoughtful analysis:

> The Constitution says that no State [may] deprive any person of life, liberty, or property, without due process of law. Y Without a legitimate claim of entitlement there is no property.

[•] *See RRI Realty v. Southampton*, 870 F.2d 911, 917 (2d Cir. 1989)("It is not readily apparent why land regulation cases that involve applications to local regulators have applied the Roth entitlement test ... instead of simply recognizing the owner's indisputable property interest in the land he owns").

[▪] *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, at 600-01, n.9 (3d Cir. 1995) (internal citations omitted).

> [Appellant] may well have lacked a property interest in one classification rather than another. But it surely had a property interest in the land, which it owned in fee simple ... **An owner may build on its land; that is an ordinary element of a property interest.** Zoning classifications are not the measure of the property interest but are legal restrictions on the use of property. Licenses, permits, and classifications are important to owners because they reflect governmental promises not to interfere with private uses of property, but let us not confuse a decision not to intervene with the property itself.
>
> ... Those things people can hold or do without the government's aid count as property or liberty no matter what criteria the law provides. Y Otherwise a single local ordinance providing that "we may put your land in any zone we want, for any reason we feel like" would abolish all property rights in land overnight. The due process and takings clauses are made of sterner stuff.•

Second, the District Court's interpretation of the entitlement test also presents a problem as to circularity:

> A municipality simply has to announce in its land use regulations that land use approvals, such as site plan approvals, do not confer an entitlement. The municipality accomplishes this by adopting a land use ordinance that gives it the discretion to grant or refuse the approval. This discretion defeats a claim

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• *River Park v. Highland Park*, 23 F.3d 164, 165-66 (7th Cir. 1994) (internal citations omitted)(emphasis added).

> of entitlement, which exists only if a municipality has a mandatory duty to grant the approval.[9]

A municipality has no Constitutional obligation to follow careful procedures, and property interests only exist when they have been granted as a special benefit, of which "the political branches may deprive individuals of that interest without following due process."[10]

III. Discretion and Behavior are Both Important

If substantial power is to be allocated to local governments, why should the amount of discretion in a local statute be an important factor in determining whether there has been an abuse of that power? The answer lies in the administration of zoning.

As the *Gardner* Court noted, heated political battles between developers and the community are a necessary and predictable evil in the land-use context:

> One protects oneself against the predictable evil by not participating in the risky venture, by not purchasing the property that needs the seldom-granted **zoning change**. It is precisely because exit is relatively available at local governmental levels that predictability can test fairness. ... [L]and use changes occur in a climate of regulation, and **if developers are aware of the climate they can account for it in private**

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[9] Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation*, 3 WASH. U.J.L. & POL'Y 61, 66 note 23 (2000).

[10] Tim Searchinger, Note, *The Procedural Due Process Approach to Administrative Discretion: The Courts' Inverted Analysis*, 95 YALE L.J. 1017, 1021-23 (1986).

> **arrangements; it is only the unforeseen governmental action that is unfair.**·

This reasoning is why local governmental discretion is an important factor in a due process analysis. A developer can look to the municipal statutes to see if the project he proposes is expressly allowed, or whether he will need a variance or a special use permit before he buys the property. The Developers in this case were applying for a use that was expressly permitted by the City's zoning ordinances.

Like most states, South Carolina imposes an onerous burden upon a project not expressly allowed by the zoning ordinances, i.e. it needs a variance or special exception. S.C. Code § 6-29-800, entitled, "Powers of board of appeals; variances; special exceptions" sets forth the burden as follows:

> (A) The board of appeals has the following powers:
>
> (2) ... A variance may be granted in an individual case of **unnecessary hardship** if the board makes and explains in writing the following findings:
>
> (a) there are **extraordinary and exceptional conditions** pertaining to the particular piece of property;
>
> (b) these conditions do not generally apply to other property in the vicinity;
>
> (c) because of these conditions, the application of the ordinance to the particular piece of property would

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· Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 907 (1983) (This Article was cited as support for the entitlement standard in *Gardner v. Baltimore*, *infra*) (emphasis added).

> effectively prohibit or unreasonably restrict the utilization of the property; and
>
> (d) the authorization of a variance will not be of substantial detriment to adjacent property or to the public good, ...
>
> (i) The board may not grant a variance, the effect of which would be to allow the establishment of a use not otherwise permitted in a zoning district ... Other requirements may be prescribed by the zoning ordinance.
>
> (ii) A local governing body by ordinance may permit or preclude the granting of a variance for a use of land, a building, or a structure that is prohibited ...

Thus, where developers know the subject property needs a variance, special exception, or a zoning change, as in *Gardner*, *Biser*, and *Sylvia*, they are starting out on the wrong side of the law, and there is no **unfair** surprise when their plans are rejected.

This reasoning is also why the District Court's interpretation of the entitlement standard is inappropriate in the case at bar. Developers submitted their plans for a use that was consistent with the zoning ordinances in force at that time. **No zoning change, variance, or special exception was necessary.** The District Court erred in finding this to be "a distinction without a difference."*

The CAB ordinances which are the subject of this action were discussed by the South Carolina Supreme Court in

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* District Ct. Order, J. App. 672, note 7.

Peterson Outdoor Advertising v. Myrtle Beach. The *Peterson* Court held that a municipality's application of aesthetic ordinances must have "clear standards to limit the subjective exercise of discretion by the enforcing authorities," and the municipality must provide legitimate reasoning to inform the developer as to what corrective actions can be taken.· Thus, in *Peterson*, the City of Myrtle Beach was warned not to arbitrarily use its aesthetic review to deprive a property owner of its right to the lawful use of its property.

The facts of this case clearly show that the neighboring properties had been developed in the same fashion, and the Developer's proposed plans satisfied every aspect of the City's ordinances. The City's flagrant and illegitimate use of aesthetic review to re-zone one particular piece of property is not a valid exercise of the "discretion" they purport to have had, and now cower behind. The City's unforeseeable behavior was not just a surprise B it was an unfair surprise.

Discretion is important. However, where that discretion is significantly limited, and subsequently used in such a manner as to intentionally deprive a property owner the lawful right to use property, the government's behavior should relevant. Discretion should not be a bright line test precluding judicial review and trumping the United States Constitution.

IV. Conclusion

Although several technical arguments are in play, this case presents one simple issue. Is a local government free to act however it wants, or is it constrained? The United States Constitution provides a limit on all governmental behavior, and the Supreme Court has consistently stated

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· 327 S.C. 230, 234, 489 S.E.2d 630, 632 (1997) (citing 6A McQuillen Mun. Corps. 24.15 (3d ed. 1997)); *see also* Trial Ct. Order, J. App. at 13.

that oppressive and abusive government behavior is relevant. While the entitlement test is correct in that discretion is an important factor in the land-use context, to the extent that the entitlement test as stated in *Gardner*, *Biser*, *Sylvia*, renders abusive and oppressive governmental behavior absolutely immaterial or irrelevant, it is, respectfully, wrong.

This appeal is not an attack on the amount of deference federal courts give to local governments or the system of zoning itself. Nevertheless, the law as interpreted and applied by the District Court goes too far, and the facts of this case present this Honorable Court with the opportunity to make it right. The entitlement test should not preclude review where discretion is limited and there is evidence of egregious behavior. While every alleged arbitrary and capricious action does not constitute a violation of substantive Due Process, some might, and they must be analyzed appropriately.

Appellants respectfully pray this Honorable court will grant an en banc hearing to consider whether abusive and oppressive governmental behavior is relevant, and whether there is a limit to the Fourth Circuit's entitlement test, despite limited discretion, at the outer margins of municipal behavior.

Respectfully submitted,

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March 7, 2005

RECORD NO. 04-2171

In The
United States Court of Appeals
For The Fourth Circuit

SUNRISE CORPORATION OF MYRTLE BEACH;
BOULEVARD DEVELOPMENT LLC;
S&H DEVELOPMENT INC.,
Plaintiffs – Appellants,

v.

THE CITY OF MYRTLE BEACH;
MARK McBRIDE; JUDY RODMAN;
RACHAEL BROADHURST; CHARLES MARTINO;
WILSON CAIN; CRAIN WOODS; LARRY BRAGG;
TOM CONN; TOM DAVIS; SALLY HOWARD;
FRED ROURK, Individually,
Defendants – Appellees.

[ENTERED: January 6, 2005]

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF
SOUTH CAROLINA AT FLORENCE

BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUES

This case presents the following questions for review:

1. Did the District Court err in holding the City is not barred by res judicata and allowing them to argue their actions did not violate Appellants' federal Due Process, Equal Protection, and Fifth Amendment rights, where the Horry County Master in Equity issued an Order which expressly held the City's actions were "a denial of Plaintiffs' due process and equal protection rights," and in violation of "Fifth Amendment law," where the courts of South Carolina would be bound by this determination?

2. Did the District Court err by holding that Plaintiffs-Appellants Sunrise Development and S&H Development, Inc. do not have prudential standing to recover for their own actual and particularized damages that were directly inflicted upon them by the City?

3. Did the District Court err in Dismissing Plaintiffs-Appellants Due Process Claims by holding they do not have a property interest in the land they own in fee simple, and that Defendants-Appellees behavior is always irrelevant, where the Defendants-Appellees' actions were "flagrantly" illegitimate and illegal under the guise of aesthetic ordinances, and where the discretion within aesthetic ordinances is significantly limited as a matter of state law?

4. Did the District Court err in dismissing Plaintiffs-Appellants Equal Protection Claim by holding Plaintiffs-Appellants failed to present evidence as to being similarly situated and the victim of illegitimate discretion, when the parties have already litigated these issues, and the Trial Court has made numerous conclusive and dispositive findings of facts as to this same evidence?

5. Did the District Court err in Dismissing Plaintiffs-Appellants' Takings and Inverse Condemnation Claims by holding the lawful use of property was not an antecedent property right, and by holding that the six year delay is only an unfortunate by-product of the adjudicatory system as a matter of law, where Defendants-Appellees' actions were a "flagrant" violation of state law which inflicted permanent and extraordinary damages?

* * *

SUMMARY OF ARGUMENT

The District Court erred by not applying the doctrine of res judicata and collateral estoppel and thereby allowing the City to argue that its actions were not a violation of Appellants' Due Process, Equal Protection, and Fifth Amendment rights. 28 U.S.C. § 1738 commands a federal court to accept the rules chosen by the State from which the judgment is taken. The parties have litigated these issues, and the South Carolina courts have already made findings of fact and conclusions of law that would be binding in the South Carolina courts.

The District Court erred in dismissing S&H Development and Sunrise Corporation for lack of prudential standing because each Appellant in this action is suing to recover its own concrete, particularized, and actual damages.

The District Court erred in interpreting the threshold test for Due Process to mean that the existence of even the most limited municipal discretion, regardless of whether it was or even could have been exercised, is always dispositive, while municipal behavior is never relevant. In addition, the Fourth Circuit has yet to articulate a reason as to why a property ownership,

coupled with the lawful use of that property, does not qualify as a property interest.

The District Court erred in dismissing Appellants' Equal Protection claim due to a lack of evidence as to being similarly situated and the victim of discrimination when the parties have already litigated these issues and the South Carolina Courts have made specific findings of fact and conclusions of law.

The District Court erred in dismissing Appellants' Takings claim in disregard of the express holding of the South Carolina Courts which expressly held that the City's actions were contrary to Fifth Amendment law, as well as "obviously" and "flagrantly" illegitimate and illegal.

ARGUMENT

I. Standard of Review

Summary judgment is appropriate under Federal Rule of Civil Procedure 56(c) "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[·] This Honorable Court reviews the grant of summary judgment de novo.[·] Since both parties had moved for summary judgment, the Court must apply the same standard of review and may not resolve genuine

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[·] *Monumental Paving & Excavating, Inc. v. Pennsylvania Manufs.' Ass'n Ins. Co.*, 176 F.3d 794, 797 (4th Cir. 1999) (*quoting Anderson v. Liberty Lobby*, 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)).

[·] *Id.* (*citing Roe v. Doe*, 28 F.3d 404, 406-7 (4th Cir. 1994)).

issues of material fact.· Instead, the Court should consider and rule upon each party's motion separately and determine whether summary judgment is appropriate as to each under the Rule 56 standard.·

The initial burden in a summary judgment motion falls on the party making the motion:

> A party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.·

As to Defendants-Appellees' Motion for Summary Judgment on Plaintiff-Appellants' Due Process, Equal Protection, and Takings claims, the District Court did not view the unique facts and circumstances of this case in a light most favorable to the Plaintiff-Appellants as the non-moving party. Questions of law and fact clearly exist as to these claims.

As to Plaintiffs-Appellants' Motion for Partial Summary Judgment based on the doctrines of res judicata, collateral estoppel, and the law of the case, the District Court made an error of law. The state court judgment expressly holding that Defendants have violated Appellants' Due Process, Equal Protection, and Fifth Amendment rights must be given the same full

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· *Id.* (*citing ITCO Corp. v. Michelin Tire Corp., Com. Div.*, 722 F.2d 42, 45, n.3 (4th Cir. 1983), *cert. denied*, 469 U.S. 1215, S. Ct. 1191 (1985)).

· *Id.* (*citing* Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2720 (2d ed. 1983)).

· *Id.*

faith and credit in a court of the United States as the judgment would have by law and usage in the courts of South Carolina. The South Carolina courts would not allow a collateral attack on the Trial Court's Order.

II. Res Judicata, Collateral Estoppel, and Law of the Case

Res judicata bars parties from litigating a second lawsuit on the same issues, or any other issues arising from the same transaction or series of transactions, that could have been, but were not, raised in the first suit.· Res judicata is founded on the principle of stare decisis, and its application avoids harassment, judicial waste, inconsistent verdicts, and promotes fairness.·

Almost six years ago, the Honorable J. Stanton Cross, Jr., Master-In-Equity for Horry County filed an Order which conspicuously and expressly held that the City's actions were (1) arbitrary, (2) subjective, (3) without evidentiary support, (4) an abuse of discretion, (5) merely a pretense to stop development, **(6) a denial of Plaintiffs' due process and equal protection rights, and (7) contrary to Fifth Amendment law.**·

In the Oral Order of September 4, 2003, Judge Houck stated the doctrine of res judicata did not apply in this case because Appellants, as the prevailing party in the state courts, failed to obtain a clarification of the Trial Court Order as to whether Appellants' federal Due Process and Equal Protection rights were denied.· Thus,

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· RESTATEMENT (SECOND) OF JUDGMENTS §§ 17, 24 (1982).

· *Plum Creek Dev. Co., v. Conway*, 334 S.C. 30, 34, 512 S.E.2d 106 (1999).

· Trial Ct. Order, Joint Appendix (J. App) at 13, 37, 43 (emphasis added).

· Trans. of Mot. Hearing, J. App. at 579-82, 83.

Judge Houck improperly allowed a collateral attack on the Trial Court Order by switching the burden of obtaining clarifications, raising defenses, and preserving issues to the prevailing party. The burden was switched even though Judge Houck recognized that South Carolina would bar relitigation: "I don't think the [City] could successfully argue there wasn't a prior adjudication that would preclude issues from being raised."[-]

The issues of Due Process, Equal Protection, and Takings have been litigated in the state courts of South Carolina, and from the beginning Appellees' have admitted the applicability of res judicata. For example, Appellees' Amended Answer, dated March 10, 1999, asserted "In further answer to the Complaint, and as a Ninth Defense to it, the Complaint of Plaintiff Boulevard Development, L.L.C. should be dismissed as to some or all of the Defendants **because the same claim is pending in another action.**"[-] In their pending Motion for Summary Judgment dated January 18, 2000, Defendants asserted:

> Pending in the state courts of South Carolina is an action between the Defendant City of Myrtle Beach and Boulevard Development, LLC. That cause of action alleges an abuse of discretion on behalf of the City in denying CAB approval, and specifically alleges a violation of due process and equal protection. **As these issues have been adjudicated in the lower state court, and are currently pending there on appeal, the doctrine of res judicata precludes this**

[-] Trans. of Mot. Hearing, J. App. at 583.

[-] Docket Entry 2, J. App. at 5 (Def. Answer at ¶ 44 (filed Jan. 15, 1999) (emphasis added)).

> **Plaintiff from relitigating the same issues in this forum.**[1]

There can be no clearer admissions that the City knew of these federal claims, and prayed for the District Court to actually apply the doctrine of res judicata.

Under 28 U.S.C. § 1738, all federal courts must give full faith and credit to state court judgments,[2] and this statute extends res judicata to actions under 42 U.S.C.A. § 1983.[3] Thus, the "records and judicial proceedings of any court of any such State ... shall be ... admitted in other courts within the United States and ... shall have the same full faith and credit in every court ... as they have by law or usage in the courts of such State ...."[4]

> The Supreme Court has expressly held that the full faith and credit statute "directs a federal court to refer to the preclusion law of the State in which judgment was rendered." ... Thus, § 1738 "does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it ... **commands a federal**

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[1] Docket Entry 17, J. App. at 6 (Def. Mot. for Summ. J. at 24 (filed Jan. 19, 2000) (emphasis added)).

[2] 28 U.S.C.A. § 1738; *see also Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 466, 102 S. Ct. 1883 (1982); *In re Genesys Data Tech., Inc.*, 204 F.3d 124, 127-128 (4th Cir. 2000).

[3] *See* 15 AM. JUR. 2D *Civil Rights* § 142 (2002).

[4] 28 U.S.C.A. § 1738; *See also Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 896 (1984); *Allen v. McCurry*, 449 U.S. 90, 101 S. Ct. 411 (1980).

court to accept the rules chosen by the State from which the judgment is taken."[-]

South Carolina law relating to res judicata is clear. To establish res judicata, a party must show: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the claim in the former suit.[-] All three elements are easily satisfied in this case as to the Appellee City.

As to the first element, a final judgment on the merits in a prior action will preclude the parties and their privies.[-] Appellee City of Myrtle Beach was the defendant in this action as well as the state court action. The second element, identity of the subject matter, is also easily satisfied because both the state court proceedings and this lawsuit unquestionably arise from the same factual and legal basis—the "fragrantly"[-] illegitimate and illegal denial of CAB approval.

The third element, adjudication of the issue in the former suit, is also satisfied by the conspicuous and express holding of the Trial Court on the claims of Due Process, Equal Protection, and Takings law.[-] Additionally, even if the Trial Court Order was limited to

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[-] *In re Genesys Data Tech., Inc.*, 204 F.3d 124, 127-28 (4[-] Cir. 2000) (*quoting Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S. Ct. 1327 (1985).

[-] *Plum Creek Dev. Co.*, 334 S.C. at 34; *Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 419 S.E.2d 217 (1992); *Sealy v. Dodge*, 289 S.C. 543, 347 S.E.2d 504 (1986); *Hart v. Bates*, 1882 WL 5563 (S.C. 1882).

[-] *Plum Creek Dev. Co.*, 334 S.C. at 34; *Bagwell v. Hinton*, 205 S.C. 377, 32 S.E.2d 147, 156 (1944).

[-] Trial Ct. Order, J. App. at 27, 29, 32, 33.

[-] Trial Ct. Order, J. App. at 12, 37, 43.

state constitutional claims, which it clearly is not, res judicata would bar Appellees "**from raising any issues which might have been raised in the former suit.**"[•] Thus, under South Carolina law, if Appellee City wanted to limit the scope or preclusive effect of an express holding in the Trial Court's Order, the burden was squarely upon them to do so in the state courts.

On June 1, 1999, the City moved for an Order altering or amending the Trial Court Order, or in the alternative asking for a new trial, based on 51 specific allegations of factual and legal error.[•] The City did not challenge the Due Process, Equal Protection, or Takings holdings, and Judge Cross affirmed his Order with the exception of one footnote.[•] The City then appealed the judgment, and the Court of Appeals affirmed *in toto* with no dissent.[•] The Supreme Court granted a petition for a writ of certiorari, considered the parties' briefs, heard oral argument, and summarily dismissed the writ as improvidently granted on December 19, 2002.[•]

In South Carolina, a final judgment on the merits rendered by a court of competent jurisdiction, without fraud or collusion, is conclusive as to the rights of the parties and their privies, "even [if] the judgment is

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[•] *Plum Creek Dev. Co.*, 334 S.C. at 34, 512 S.E.2d at 109 (*quoting Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)) (emphasis added).

[•] Respondents' Mot. to Alter or Amend, J. App. at 241-257.

[•] Order of Master in Equity, J. App. at 258.

[•] *Boulevard Dev. v. Myrtle Beach*, Op. No. 2001-UP-091 (filed Feb. 13, 2001) (the last sentence of the Opinion states, "Based upon our review of the trial judge's findings, we find no error"), J. App. at 216-225.

[•] *Boulevard Dev. v. Myrtle Beach*, Mem. Op. No. 2002-MO-079 (filed Dec. 19, 2002), J.App. at 226-227.

manifestly wrong in law or fact."· Defendants effort to limit the preclusive effect of the South Carolina Supreme Court's ruling is an impermissible collateral attack, in hopes of a different outcome in this forum. Nevertheless, Appellees' actions were a denial of Appellants' Due Process, Equal Protection, and Fifth Amendment rights, and this is not a technicality, it is the law of the case.

> If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review. *E.g., Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993); *Hoffman v. Powell*, 298 S.C. 338 (1989); see also Rules 52(b) and 59(e), SCRCP.
>
> Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. *See Roche v. South Carolina Alcoholic Beverage Control Comm'n*, 263 S.C. 451 (1975) (purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant's contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal). The requirement also serves as a keen incentive for a party to prepare a case thoroughly. **It prevents a party from keeping an ace card up his sleeve - intentionally or by chance – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.** *See*

· *S.C. Dep't of Soc. Servs. v. Basnight*, 346 S.C. 241, 248 (Ct. App. 2001); *Quarles v. Miller*, 86 F.3d 55, 57 (4th Cir. Va. 1996) (*citing Carpenter v. Ingram*, 152 Va. 27, 146 S.E. 193, 195 (Va. 1929)).

> *Brown v. Singletary*, 226 S.C. 482 (1955) (party may not neglect or ignore vices in the trial, then expect to assert those vices on appeal in case of disappointment); *State v. Warren*, 207 S.C. 126, 134 (1945) (same).[-]

The City was obligated to request any clarification, as well as raise any and all applicable issues and defenses pertaining to Due Process, Equal Protection, and Takings law in the state courts. The City's failure to respond appropriately or to limit the state court holding is not a basis to collaterally attack the state court judgment by relitigating the exact same facts, circumstances, and rights in this lawsuit.[-]

Relitigation would be extremely prejudicial and unfair, and two inconsistent judgments can not be valid.[-] Congress enacted 28 U.S.C. § 1738 to avoid this type of judicial friction between the federal and state courts, and as this Honorable Court has recognized this statute, "commands a federal court to accept the rules chosen by the State from which the judgment is taken."[-] In South Carolina, the burden is on the losing party to obtain clarifications, raise all issues, and preserve all applicable defenses. Respectfully, the District Court lacked the authority to review the judgment of the Supreme Court of South Carolina and erred by placing the burden of

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[-] *I'On, L.L.C. v. Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724-25 (2000) (emphasis added).

[-] *See Plum Creek Dev. Co.*, 334 S.C. at 35, 512 S.E.2d at 109.

[-] *Nelson v. QHG of S. C. Inc.*, 2003 WL 1900861, 8 (S.C. Ct. App. 2003).

[-] *In re Genesys Data Tech., Inc.* 204 F.3d 124, 127-28 (4th Cir. 2000) (*quoting Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S. Ct. 1327 (1985).

raising issues and preserving defenses on Plaintiff-Appellants.[·]

III. Standing

In the District Court's written Order of August 9, 2004, Judge Houck dismissed Appellants' S&H Development (S&H) and Sunrise Corporation of Myrtle Beach (Sunrise) for lack of prudential standing. The court held, "[t]o have prudential standing, the putative plaintiff must not seek to recover for injuries to a third party,

* * *

Further, Appellee City's own CAB ordinances specifically contemplate that the interest of others may be harmed by their decisions, and provide for judicial review as follows: "***Any person who may have a substantial interest*** in any decision of the city council related to an appeal from a decision of the community appearance board may appeal...."[·] Appellants' S&H and Sunrise have a substantial interest, which is within the zone of interests that this ordinance was enacted to protect.

In sum, the District Court erred in holding Appellants S&H and Sunrise do not have prudential standing. Appellants are not seeking to recover for injuries to any third party, but rather are seeking to redress their own injuries.

[·] *See Resolute Ins. Co. v. North Carolina*, 397 F.2d 586 (4th Cir. 1968); *Patterson v. Newport News*, 364 F.2d 816, 818 (4th Cir. 1966); *see also Atkins v. School Bd.*, 379 F. Supp. 1060, 1062 (D. Va. 1974).

[·] Myrtle Beach, S.C., Ordinance § 607 (1998) (emphasis added), J. App. at 619-20.

IV. Due Process in the Fourth Circuit – The Entitlement Test

Plaintiffs-Appellants alleged that the City violated their procedural and substantive Due Process rights. To establish a violation of procedural Due Process, Appellants' must show (1) it had a property right and (2) the City denied that right (3) without due process of law.[5] To establish a violation of substantive Due Process, Appellants' must show (1) they had a property right and (2) the City denied that right and (3) the governmental action falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency.[6] The District Court dismissed Appellants' Due Process claim in the oral order of September 4, 2003, and the written order of August 9, 2004, specifically by finding Appellants' did not have a property right to Due Process in CAB permit issuance.[7]

The District Court relied on *Gardner v. City of Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992), *Biser v. Town of Bel Air*, 991 F.2d 100 (4th Cir. 1993), and *Sylvia Dev. Corp. v. Calvert County, Maryland*, 48 F.3d 810 (4th Cir. 1995), for the proposition that a Plaintiff in the land-use context can only have a property interest worthy of Due Process protection where he has a legitimate state created claim of entitlement to a permit.[8] The District Court's interpretation of this standard suggests that an entitlement can only exist if the CAB had absolutely no

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[5] District Ct. Order (*citing Sylvia Dev. Corp. v. Calvert County, Maryland*, 48 F.3d 810, 826 (4th Cir. 1995), J. App. at 668-69.

[6] *Id.*

[7] Trans. of Mot. Hearing, J. App. at 585-87; District Ct. Order, J. App. at 668-73.

[8] District Ct. Order, J. App. at 670.

discretion to deny the permit, and that governmental behavior is never relevant.· In this case, the District Court's excessively strict interpretation of the 4th Circuit's controversial entitlement test leads to three novel questions of law and fact: (1) why doesn't a property owner have a property interest in the lawful use of land that he owns, (2) why does a local government have the authority to decide that its behavior will never be relevant and that the United States Constitution simply does not apply in the land-use context, and (3) should the entitlement test be interpreted so that any governmental discretion defeats a property interest, regardless of whether that discretion could have been exercised, and regardless of how the discretion is circumscribed by state law?

A. Property Ownership is a Property Interest Worthy of Protection

The Fourth Circuit cases relied on by the District Court look exclusively to whether a Plaintiff has a property interest in the issuance of a permit, and without explanation, disregards any property interest that the Plaintiff has in the ownership of the land itself. While the Fourth Circuit has not directly addressed why property ownership is irrelevant, several other circuit courts of appeal have conducted very thoughtful analyses:

> [O]wnership is a property interest worthy of substantive due process protection. **Indeed, one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership.** Thus, in the context of land use regulation, that is, in

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· *Id.* at 671-72 ("In other words, it is immaterial whether the licencing agency abused its discretion in denying the permit.")

> situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached. Where the plaintiff so alleges, the plaintiff has, as a matter of law, impliedly established possession of a property interest worthy of substantive due process protection.
>
> ....
>
> [W]e are less certain [than other circuits] that the "legitimate claim of entitlement" approach is mandated by Supreme Court jurisprudence. As we have previously noted, the Supreme Court has yet to articulate a standard for determining which state-created property interests merit substantive due process protection ... a property interest within the meaning of the Fourteenth Amendment includes not only what is owned but also, in some limited circumstances, what is sought.*

The Seventh Circuit also confronted the issue of whether property ownership is a property interest worthy of Constitutional protection:

> The Constitution says that no State [may] deprive any person of life, liberty, or property, without due process of law. The district court dismissed the complaint, ruling that River Park had not been deprived of any "property." ... Without a legitimate claim of entitlement there is no property.

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*_DeBlasio v. Zoning Bd. of Adjustment_, 53 F.3d 592, at 600-01, n.9 (3d Cir. 1995) (internal citations omitted) (emphasis added).

For the reasons the district court gave, River Park may well have lacked a property interest in one classification rather than another. But it surely had a property interest in the land, which it owned in fee simple, and it is therefore entitled to contend that the City's regulation of that land deprived it of property without due process. The references to "property" in the Constitution reflect its Lockean heritage. The founding generation viewed "property" in concrete terms-land and chattels acquired by the investment of effort or purchase from another. **An owner may build on its land; that is an ordinary element of a property interest.** Zoning classifications are not the measure of the property interest but are legal restrictions on the use of property. Licenses, permits, and classifications are important to owners because they reflect governmental promises not to interfere with private uses of property, but let us not confuse a decision not to intervene with the property itself.

It has become useful to think of some governmental promises as "property." In a world characterized by many "positive liberties"—public education, grants and subsidies, public employment and the like—the arbitrary power of petty bureaucrats is checked by calling these promises "property" and requiring the government to supply due process. Efforts to distinguish among kinds of public assistance and involvement have produced the positivist approach of Roth and later cases under which only promises marked by determinate criteria count as "property." But this is a definition of the "new property" rather than the "old property." In the main, the Constitution is a charter of negative rather than positive liberties. Those things people can hold or do

> without the government's aid count as property or liberty no matter what criteria the law provides. ... Otherwise a single local ordinance providing that "we may put your land in any zone we want, for any reason we feel like" would abolish all property rights in land overnight. The due process and takings clauses are made of sterner stuff.[-]

The entitlement test emerged from the landmark Supreme Court case of *Board of Regents v. Roth*, where the Court was considering whether a non-tenured professor had a property interest in being rehired, and even there, the Court stated that property ownership is worthy of protection:

> The requirements of procedural due process apply only to the deprivation of interest encompassed by the Fourteenth Amendment's protection of liberty and property ... The Court has also made clear that property interests protected by procedural due process extend **well beyond actual ownership of real estate, chattels, or money**.[-]

While the Supreme Court has not specifically decided whether the entitlement test in the land-use context is appropriate, it has stated that the standard of judicial review should not be determined solely by the governmental ordinance being exercised:

> [T]he zoning power is not infinite and unchallengeable; it "must be exercised within constitutional limits." Accordingly, it is subject to

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[-] *River Park v. Highland Park*, 23 F.3d 164, 165-66 (7th Cir. 1994) (internal citations omitted)(emphasis added).

[-] *Board of Regents v. Roth*, 408 U.S. 564, 569-78, 92 S.Ct. 2701, 2705-09 (1972) (emphasis added).

> judicial review; and as is most often the case, **the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed.**[8]

As the District Court pointed out, the entitlement test focuses exclusively on the power being exercised, that is, whether the municipal government has provided itself with discretion. Commentators have referred to this as a circularity problem:

> A municipality simply has to announce in its land use regulations that land use approvals, such as site plan approvals, do not confer an entitlement. The municipality accomplishes this by adopting a land use ordinance that gives it the discretion to grant or refuse the approval. This discretion defeats a claim of entitlement, which exists only if a municipality has a mandatory duty to grant the approval.[9]

A municipality has no Constitutional obligation to follow careful procedures, and can deny due process protection to virtually any interest not protected by another constitutional right.[10] In sum, the 5th and 14th Amendments of the United States Constitution expressly state that property ownership is, and has always been, a property interest worthy of Due Process protection. Unless the

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[8] *Schad v. Mt. Ephraim*, 452 U.S. 61, 68 (1981) (emphasis added).

[9] Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation*, 3 Wash. U.J.L. & Pol'y 61, 66 (2000).

[10] Tim Searchinger, Note, *The Procedural Due Process Approach to Administrative Discretion: The Courts' Inverted Analysis*, 95 Yale L.J. 1017, 1021-23 (1986) ("[I]f no rule limits governmental discretion, what you might consider your property is only a government benefit.").

Constitution simply does not apply in the land-use context, the District Court's interpretation of the entitlement test is wrong.

B. Discretion and Municipal Behavior are Both Important

Under the District Court's interpretation of the entitlement test, "it is immaterial whether the licensing agency abused discretion in denying the permit."- In other words, there is no Constitutional Due Process protection against arbitrary and oppressive governmental behavior in the land-use context. In stark contrast, this Honorable Court adopted the entitlement test in *Gardner v. City of Baltimore* from jurisprudence of the Second Circuit with the following language: "We believe that this standard appropriately balances the need for local autonomy in a matter of paramount local concern **with recognition of constitutional protection at the very outer margins of municipal behavior**."- The second clause of this quote indicates that the behavior of the Appellees should have been relevant. However, if the smallest amount of discretion defeats entitlement, behavior is *never* relevant. The District Court's interpretation of the entitlement standard cannot balance local autonomy with constitutional protection, because discretion has absolutely nothing to do with behavior.

To understand the relevance of discretion, and to properly limit the entitlement test, the court must note the significant difference between a zoning change, variance, or special exception (as in the *Gardner*, *Biser*, and *Sylvia* cases relied on by the District Court below), and aesthetic zoning. Simply stated, municipal

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- District Ct. Order, J. App. at 671.

- *Gardner*, 969 F.2d at 69 (emphasis added).

discretion in the land-use context is important because it is an indicator of unfair surprise.

In the land-use context, heated political battles between developers and the community are a necessary and predictable evil:

> One protects oneself against the predictable evil by not participating in the risky venture, by not purchasing the property that needs the seldom-granted **zoning change**. It is precisely because exit is relatively available at local governmental levels that predictability can test fairness. ... [L]and use changes occur in a climate of regulation, and **if developers are aware of the climate they can account for it in private arrangements; it is only the unforeseen governmental action that is unfair.**[-]

A developer can look to the municipal statutes to see if he will need a variance or a special use permit before he buys the property. The South Carolina Code imposes an onerous burden upon a developer who will need a variance or special exception. A developer would have to prove there is an unnecessary hardship, extraordinary and exceptional conditions, the conditions do not generally apply to other property in the vicinity, the current zoning would effectively prohibit or unreasonably restrict the utilization of the property; and the variance will not be of substantial detriment to adjacent property, the public good, and character of the district.[-] Thus, where developers know the subject property needs a

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[-] Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, 71 Cal. L. Rev. 837, 907 (1983) (emphasis added) (This Article was cited as support for the entitlement standard in *Gardner v. Baltimore*, *infra*).

[-] S.C. Code § 6-29-800(A)(2)(1994).

variance, special exception, or a zoning change as in the *Gardner*, *Biser*, and *Sylvia* cases, they are starting out on the wrong side of the law, and are subject to a tremendous amount of municipal discretion. While the developer may be surprised when his permit is denied, there can be no **unfair** surprise. This is why municipal discretion is important, and this is the logical basis for the entitlement test.

This reasoning is also why the District Court's interpretation of the entitlement standard is inappropriate in the case at bar. It is undisputed that Plaintiff-Appellants bought the property and submitted plans for a use that was consistent with the zoning ordinances in force at the time.[-] **No zoning change, variance, or special exception was necessary**.[-] The land-use ordinances that are the subject of this action exclusively relate to aesthetics, and the proposed development was consistent with and superior to the existing development on the surrounding properties.[-] Under South Carolina law, if a developer is going to deny a land owner's development plans, that denial has "to be supported by objective nonarbitrary reasons which tell the developer what corrective actions can be taken in order receive building approval.[-] When the aesthetic CAB ordinances were used illegitimately and illegally to absolutely stop development and effectively re-zone one particular piece of property, Appellants were **unfairly**

[-] Trial Ct. Order, J. App. at 15, 37, 41.

[-] *Scott v. Greenville County*, 716 F.2d 1409, 1419 (4th Cir. 1983) ("Developer enjoyed an entitlement to the issuance of a permit upon presentation of an application and plans showing a use expressly permitted under the then-current zoning ordinance").

[-] Trial Ct. Order, J. App. at 13, 15, 16, 19, 21, 22, 25, 28, 34, 39.

[-] Trial Ct. Order, J. App. at 13 (citing *Peterson Outdoor Advertising v. Myrtle Beach*, 489 S.E.2d 630 (S.C. 1997).

surprised. This is why municipal discretion should not be dispositive, and this is where behavior should be more relevant.

C. Theoretical Discretion to Buttress Illegal and Inappropriate Actions

When the Fourth Circuit adopted the entitlement test it used contradictory language. First, the *Gardner* court stated: "[W]hether a property holder possesses a legitimate claim of entitlement to a permit or approval turns on whether, under state and municipal law, the local agency lacks **all** discretion to deny issuance of the permit or to withhold its approval."- However, the next sentence leads to a very different conclusion: "Any **significant discretion** conferred upon the local agency defeats the claim of a property interest."- The Fourth Circuit has not decided which sentence controls, and the District Court applied the most strict version possible.

In this case, the CAB did not have the discretion, and could not have been given the discretion, to act as it did. As noted above, the Trial Court expressly found that Appellees: (1) used aesthetic ordinances solely as a pretense to stop the lawful use of property, (2) flagrantly violated state law, (3) denied a plan that was entitled to approval, (4) acted in a manner that is per se arbitrary.- Since these findings are the law of the case and not subject to collateral review, Appellees did not and could not have actually based their decision on any discretion within the CAB ordinances as enacted. As a result, the

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- *Gardner*, 969 F.2d at 68-69 (emphasis added).

- *Id.*

- Trial Ct. Order, J. App. at 13, 20, 21, 24, 27-29, 32-34, 36, 43 (*citing* McQuillen, *Municipal Corporations*, 3rd ed., § 26.211 ("It is per se arbitrary and unreasonable to deny a property owner the ability to use his property in any legal fashion."))

District Court's analysis of CAB discretion was based solely on discretion that only could have been exercised in theory.[-]

In *Sullivan v. Salem* the Second Circuit confronted a similar factual situation and subsequent harsh interpretation of the same entitlement standard by the district court below.[-] In *Sullivan* a developer was denied a certificate of occupancy because local roads had not been accepted for dedication.[-] Even though the building inspector's actions were an illegitimate and illegal exercise of discretion, the lower court found that the developer did not have a property interest.[-] The local ordinances provided discretion to deny a permit for a number of reasons, but the building inspector did not and could not have relied on this theoretical discretion.[-] The *Sullivan* court reversed the lower court's harsh interpretation of the entitlement standard with the following analysis:

> By that standard we did not intend to remove from constitutional protection every application for a license or certificate that could, under any conceivable version of facts, be the subject of discretionary action; a theoretical possibility of discretionary action does not automatically classify an application for a license or certificate as a mere "unilateral hope or expectation." On the contrary, our standard was intended to be a tool capable of measuring particular applications to

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[-] District Ct. Order, J. App. at 671-672.

[-] 805 F.2d 81, 84-86 (2d Cir. 1986).

[-] *Id.*

[-] *Id.*

[-] *Id.*

> determine if the applicant had a legitimate claim of entitlement based on the likelihood that without the due process violation that application would have been granted.[•]

In this case, the South Carolina Supreme Court's affirmation of the Trial Court's findings conclusively prove that without the due process violation, Appellants absolutely were entitled to CAB approval. The District Court's evaluation of the Appellee City's CAB ordinances was an analysis of purely theoretical discretion.[•]

Even if theoretical discretion, i.e. discretion within the CAB ordinances that was not and could not have been used, is a basis to deny Appellants the lawful use of their property, in this case the CAB discretion does not rise to the level of significant discretion. First, the Trial Court specifically found that the discretion of the CAB is strictly circumscribed by specific criteria in CAB ordinances.[•] Second, the Trial Court found that Section 604.3 of the CAB Ordinances further limited the actions of the CAB.[•] This ordinance specifically states the CAB "shall not have the authority to ... modify ... the requirements of any ... applicable city ordinance."[•] Thus, the CAB did not have and could not have been given the authority to effectively re-zone the subject property. Third, and most importantly, the Trial Court specifically found that the discretion of the CAB is strictly circumscribed by state law as set forth in *Peterson*

[•] *Id.*

[•] District Ct. Order, J. App. at 671-72.

[•] Myrtle Beach CAB Ordinances, J. App. at 46-53.

[•] Trial Ct. Order, J. App. at 35.

[•] *Id.*

Outdoor Advertising v. City of Myrtle Beach, 489 S.E.2d 630 (S.C. 1997).[-]

At one time it was generally a well-settled rule that the police power could not be exercised for a merely aesthetic purpose.[-] However, in *Peterson* the Supreme Court of South Carolina held that Appellee City's aesthetic ordinances are a valid exercise of municipal authority, **provided** (1) the regulation contains clear standards to limit the subjective exercise of discretion by the enforcing authorities, and (2) any delegation of the administration of the ordinances to a board must limit the board's discretion by clear rules and standards.[-] The Trial Court Order, specifically found, and the South Carolina Court of Appeals and Supreme Court agreed, that Appellees were in "flagrant"[-] disregard of the mandate set forth in *Peterson*, because "if Defendant is going to deny a land owner's development plans, ... that denial [has] to be supported by objective, nonarbitrary reasons which tell the developer what corrective actions can be taken in order to receive building approval."[-] The Trial Court also found:

> Plaintiffs even repeatedly asked Defendant what changes needed to be made to Plaintiffs' plans in order to receive CAB approval, told Defendant they would change whatever Defendant wanted changed, and that money was not an issue (at the time). Defendant, however, refused to even give

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[-] Trial Court Order, J. App. 12-44.

[-] *See* 16A AM JUR 2D, *Constitutional Law* § 349; *Welch v. Swasey*, 214 U.S. 91, 107 (1909).

[-] *Peterson*, 489 S.E.2d at 632 (S.C. 1997).

[-] Trial Ct. Order, J. App. at 27, 29, 32, 33.

[-] *Id.* at 13.

> Plaintiffs any objective guidance as to what would have to be done to obtain CAB approval.[8]

Indeed, the Untied States Supreme Court has expressly held that under the Due Process clause, the "hallmark of property ... is an individual entitlement grounded in state law, which cannot be removed except for cause."[9]

The specific limits on CAB discretion and the duty of the Appellee City to advise Appellants in good faith, coupled with Appellants' willingness to make any aesthetic change necessary, conclusively proves as a matter of South Carolina law that discretion was limited to the extent that without the Due Process and Equal Protection violation CAB approval was virtually assured, and Appellants were legitimately entitled to the permit.

D. Procedural and Substantive Due Process

The District Court did not make a determination as to the second and third elements of Appellants' procedural and substantive due process claims. For the sake of conciseness, Appellants will only briefly discuss these elements, which are set out fully in Plaintiff's Memorandum Opposing Summary Judgment at pages 25 to 31.[10]

Procedural and substantive Due Process requires a showing that said denial was without due process of law.

> [I]t has been recognized that zoning action which is "tainted with fundamental procedural irregularity, racial animus, or the like" does

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[8] *Id.* at 14.

[9] *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S. Ct. 1148, 1154 (1982).

[10] *See* Docket Entry 31, J. App. At 8.

> amount to an actionable denial of due process. As we suggested in *United Land Corp.*, 613 F.2d at 501, **where there is fairly alleged a basis for finding either "abuse of discretion [or] caprice in [a] zoning administrator's refusal to issue" a building permit, a Fourteenth Amendment claim is properly stated.**[-]

As to procedural due process, it "is axiomatic that due process guarantees include the right to an unbiased decision-maker."[-] Otherwise, the opportunity to be heard, is no opportunity at all. Appellants have produced evidence that a decision based on illegal grounds had already been made before any hearing was held, thereby making the process a sham, and they are therefore entitled to go forward on with their procedural due process claim.[-]

Similarly, the Trial Court's findings as to the egregious, illegitimate, and illegal actions in the CAB process is a proper basis for a substantive due process claim. While Appellant's prevailed in the courts of South Carolina as to establishing their right to the lawful use of their property, they have not recovered any of the damages that were arbitrarily and oppressively inflicted upon them. A legal remedy is never adequate if the injured party will suffer irreparable injury by being forced to resort to it, even though he or she may ultimately prevail.[-] There is simply no process that can

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[-] *Scott v. Greenville County*, 716 F.2d 1409, 1419-20 (4th Cir. 1983) (internal citations omitted) (emphasis added).

[-] *Hensley v. Jasper Police De[illegible]* F. Supp. 2d 1006, 1020 (S.D. Ind. 2001) (*citing Goldberg v. K[illegible]* 397 U.S. 254, 271, 90 S. Ct. 1011 (1970)).

[-] Trial Ct. Order, J. App. at 37; Depo. of McBride, J. App. at 510-15.

[-] 42 AM JUR 2D, *Injunctions* § 24.

cure or protect a property owner when those charged with the administration of the law are determined to violate it. Substantive Due Process was meant to provide an absolute check on the oppressive and arbitrary exercise of power.

V. Equal Protection

The Supreme Court made it "clear in *Village of Willowbrook v. Olech*, that a party can bring an equal protection claim by alleging it has 'been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'"- In its written order dismissing Appellants' Equal Protection claim, the District Court made an error of fact and law. First, the court held that there was "no evidence in the record regarding community objections to any of the other developments or developers Boulevard offer up as 'similarly situated.'"- Second, the court held that the illegal and illegitimate actions of the Appellees, "even if discriminatory, were based on a legitimate governmental concern."- The numerous findings of fact in the Trial Court's Order, of which Appellee is collaterally estopped from contesting in this court, prove that this issue has already been litigated and are dispositive as to both of these holdings.

The District Court stated that there was no proof as to community objection **to other developers**.- Appellants agree with this statement and would further suggest that no such proof exists because their project

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- *Tri County Paving, Inc. v. Ashe County*, 281 F.3d 430, 438-39 (4th Cir. 2002).

- District Ct. Order, J. App. 674.

- *Id.*

- *Id.*

was the first and only high-rise condominium to be rejected under the guise of Appellee City's aesthetic zoning ordinances. All previous and subsequent developers received CAB approval without being subjected to this inequitable and invidious discrimination.

As to evidence in the record regarding similarly situated entities, the Trial Court specifically and expressly found that Appellants:

- Were similarly situated with other property zoned TA-120 under the City's ordinances which had received a permit and had in fact developed a high-rise condominium,[-]

- Introduced exhibits to prove they were similarly situated with other high rises in the immediate vicinity,[-]

- Introduced evidence showing "various high rises all around Plaintiffs' property"[-]

- Proved that the proposed "project would not be the first high rise in Myrtle Beach, or even the first one in this area. The oceanfront, second row, and third row is lined with high rises, and Plaintiff presented evidence of other high rises surrounding the St. John's Inn, including a high rise directly west, and several directly east, of the St. John's."[-]

[-] Trial Ct. Order, J. App. at 14.

[-] *Id.* at 23-24 (referring to Plaintiffs' Exhibits 3, 4, 6, and 21).

[-] *Id.* at 28.

[-] *Id.* at 29 (referring to Plaintiffs' Exhibits 6 and 21).

- Introduced at least one expert witness who "testified that his firm has designed over thirty high rises in Horry County, and this is the first project to be rejected."[-]

- Introduced evidence proving that a recently built parking garage, "which is in close proximity to Plaintiffs' property and in the same neighborhood, had a completely 'blank' 25 foot wall [and neither] the CAB nor Council gave any reason why Plaintiffs were being singled out and required to do more than other developers who were recently allowed to have completely blank walls in the same neighborhood."[-]

- Introduced evidence proving the City was "singled out to unilaterally exceed the City's own storm water management requirements."[-]

- Introduced evidence showing the "subject property is zoned for this project, and there are over a hundred identical projects up and down the Grand Strand."[-]

- Introduced evidence showing that "this is not the first high rise in Myrtle Beach, this area, or this block. The Sea Mark Tower is directly west of (behind) the St. John's. There are also four high rises directly east of (in front of) the St. John's Inn, including the Patricia Grand North, Carolina

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[-] *Id.*

[-] *Id.* at 31 (referring to Transcript of September 3, 1998, Hearings of City Council acting as the CAB, p. 66, ll. 21-23; and Plaintiffs' Exhibit 21).

[-] *Id.* at 34.

[-] *Id.*

Dunes, the Beach House condominiums, and the Caravelle."-

- Introduced evidence regarding storm water management was never a concern and that "the CAB never rejected a plan for this reason."-

Appellants were similarly situated to other developers in the Myrtle Beach area as a matter of law.

This Honorable Court has recognized that the administration of an ordinance must be "rationally related to a **legitimate state interest**."- Further, this court has made it clear that the ordinances being applied defines the scope of what is legitimate.- In stark contrast, the District Court stated that bowing to community opposition was a legitimate state interest, even if the Appellees' actions were illegal and discriminatory.- As stated above, the South Carolina Supreme Court in *Peterson Outdoor Advertising* has stated, aesthetic ordinances are a valid exercise of municipal authority, **provided** (1) the regulation contains clear standards to limit the subjective exercise of discretion by the enforcing authorities, and (2) any delegation of the administration of the ordinances to a board must limit the board's discretion by clear rules and standards.- While enacting aesthetic zoning ordinances

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- *Id.* at 40 (citing Plaintiffs' Exhibits 6 and 21 showing multiple high rises in the area).

- *Id.* (referring to comments of CAB members Bates, Stocks, and Rothrock).

- *Tri County Paving, Inc.*, 281 F.3d at 438.

- *See id.* at 439.

- District Ct. Order, J. App. at 674-75.

- *Peterson*, 489 S.E.2d at 632.

is a political function, the flagrantly illegitimate and illegal application of CAB ordinances is not.

As to evidence of the legitimacy, legality, discriminatory, and rational basis of Appellees' actions, the Trial Court specifically and expressly found:

- That every opponent of Plaintiffs' plans who spoke at the September 3, 1998 hearing in front of the Myrtle Beach City Council acting as the CAB "specifically and unequivocally argued the issue was one of stopping development in this area of Myrtle Beach."-

- Even though Defendant was bound to apply the laws in effect that were rightfully relied on by Plaintiffs in good faith, when "Council began its discussion on September 3, it made clear that its only concern was stopping Plaintiffs' plans regardless of the evidence."-

- Sea Mark residents stated they did not want their ocean view blocked, and other opponents stated they were opposed to further development in the area.-

- There is no right to an easement of view in South Carolina.-

- The CAB ordinance can not be relied on as a tool to stop legal development, and in the process divest the Plaintiffs' of their rights. If Defendant

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- Trial Ct. Order, J. App. at 20.

- *Id.* at 21-22.

- *Id.* at 24.

- *Id.* at 28 (*citing O'Shea v. Lesser*, 416 S.E.2d 629 (S.C. 1992); *Hill v. The Beach Co.*, 306 S.E.2d 604 (S.C. 1983)).

wanted to stop or control development it must proactively change the zoning ordinances."

- "Section 604.3 of the CAB Ordinance specifically states the CAB 'shall not have the authority to ... modify ... the requirements of any ... applicable city ordinance."
- The denial of CAB approval was "[M]erely a pretense to stop development."

Circumventing the law to effectively re-zone property with purely aesthetic ordinances simply because there is community opposition to lawful development is not a mistaken policy judgment or a legitimate state interest, it is a brand of anarchy called mob rule.

Even if this Honorable Court were to hold that res judicata does not apply despite the express holding of the Trial Court, findings of fact as to these issues are not only evidence which must be viewed in the light most favorable to Appellants as the non-moving party, these findings are the law of the case which Appelles are collaterally estopped from contesting in this court. These findings conclusively prove there was evidence in the record as to Appellants' being similarly situated to numerous oceanfront developers, and were subjected to an illegitimate, illegal, and oppressive exercise of power, and as such, Appellants' equal protection claim clearly should have survived summary judgment.

VI. Inverse Condemnation and Takings

- *Id.* at 34.

- *Id.* at 35.

- *Id.* at 43.

The parties to this action have previously litigated the issue of whether the City's actions were a taking in the South Carolina courts. The Trial Court specifically and expressly held, "[t]o deny Plaintiffs' project based solely on the subjective and arbitrary whims of Defendants goes against the clear holding in *Peterson* and basic due process, equal protection, **and Fifth Amendment law**."[1] As previously set forth in Section II of this Brief regarding res judicata, this Honorable Court has recognized that 28 U.S.C. § 1738, "commands a federal court to accept the rules chosen by the State from which the judgment is taken."[2] The South Carolina courts would be bound by the Trial Court's Order, and respectfully, this Honorable Court must not collaterally attack this holding or in any way issue a contrary order.

In its written order of August 9, 2004, the District Court reviewed Appellants' state law inverse condemnation claim, because under South Carolina law the second element of inverse condemnation incorporates federal Takings law.[3] The court properly noted that an unconstitutional taking may be found where: (1) governmental regulations deny (partially, as here, or fully) an economically viable use of the land,[4] or (2) a dedication or exaction does not substantially advance a legitimate interest.[5] Both prongs apply in this case and

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[1] Trial Ct. Order, J. App. at 37 (emphasis added).

[2] *In re Genesys Data Tech., Inc.*, 204 F.3d 124, 127-28 (4th Cir. 2000) (*quoting Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S. Ct. 1327 (1985)).

[3] District Ct. Order, J. App. at 675.

[4] *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646 (1978).

[5] *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141 (1987).

require the City to pay just compensation for their illegitimate and illegal actions.

A. Antecedent Property Rights

First, the District Court stated the City's actions did not interfere with Appellants' antecedent bundle of rights at all, but neglected to identify what "background principles" of state law have deprived Appellants of the lawful right to use their property.[-] Whether the proposed plan was in fact a lawful use of property according to the zoning ordinances in force at the time has been thoroughly litigated, and the Trial Court expressly noted that this issue was uncontested.[-] Plaintiffs' "plans complied with all City ordinances and received the blessing of the Zoning Administrator."[-] The District Court erred in issuing an order to the contrary. It is hard to fathom, let alone explain to a client, that they have no right to rely on the ordinances of a city, because the lawful use of their property is a only benefit that they never had.

B. Permanent and Extraordinary Regulatory Delay

The District Court also stated ample case law for the proposition that normal delays, short term delays, mere fluctuations in value, and temporary harm is an "'unfortunate by-product' of the adjudicatory system."[-] While this proposition of law is undoubtably correct, this case does not involve a delay that was normal or short, or damages that were a mere fluctuation in value or

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[-] District Ct. Order, J. App. at 677 (emphasis in original).

[-] Trial Ct. Order, J. App. at 13.

[-] Trial Ct. Order, J. App. at 13, 15, 16, 19, 21, 22, 25, 28, 34, 39.

[-] District Ct. Order, J. App. at 677-79.

temporary. In this case, the extraordinary "delay was unquestionably a long one,"[-] and was a result a "flagrant"[-] violation of state law and Appellants' Constitutional rights. As the District Court noted, "Mere fluctuation is value during the process of governmental decisionmaking, **absent extraordinary delay**, are incidents of ownership."[-] There is no question that the City's actions, taken approximately six years ago, were flagrantly illegitimate and illegal. In view of the sharp reprimand of the Trial Court Order, there is clearly a question of fact as to whether the adjudicatory delay was extraordinary, and whether the damages of being forced to sell property are indeed permanent.

C. Factored Takings – Penn Central Analysis

To determine whether a taking has occurred where an owner is denied only some economically viable use of their property, the court must apply the *Penn Central* balancing test, which balances the legitimate interests of the owner against the **legitimate** public interest advanced in support of the restraint.[-] Again, whether the city's actions were illegitimate and illegal has been thoroughly litigated between the parties, and the City's is estopped from arguing its actions were anything less than a "flagrant" violation of state law and Appellants' rights.[-]

[-] *Id.* at 678.

[-] Trial Ct. Order, J. App. at 27, 29, 32, 33.

[-] District Ct. Order, J. App. at 677-78 (*quoting Agins v. City of Tiburon*, 447 U.S. 255, 263 fn. 9 (1980).

[-] *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 119, 98 S. Ct. 2646, 2657 (U.S., 1978); *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 335-336 (2002).

[-] Trial Ct. Order, J. App. at 27, 29, 32, 33.

In stark contrast, the District Court stated that since the City was "merely reacting to the aesthetic concerns of the City's citizens" they were acting in furtherance of a legitimate state interest."- This is a clear error of fact, because the Trial Court specifically found the City's only interest was to stop development on one piece of property **under the guise of the CAB ordinances**.- In the very next sentence, the District Court made another blatant factual error: "The fact that the defendants' permit denial was without evidentiary support does not transform what is essentially a local zoning dispute into a federal constitutional case."- The Trial Court expressly held that the City's actions were a "flagrant" violation of state law, in that they were (1) arbitrary, (2) subjective, (3) without evidentiary support, (4) an abuse of discretion, (5) merely a pretense to stop development, (6) a denial of Plaintiffs' due process and equal protection rights, and (7) contrary to Fifth Amendment law.- The distinction is clear.

The District Court identified three of the most common factors used in the *Penn Central* analysis: "(1) the extent to which the regulation interfered with reasonable investment-backed expectations; (2) the regulation's economic effect on the landowner; and (3) the character of the government action."- In this case, Appellants have offered evidence which shows their lawful development objectives were completely quashed, and the City illegally refused to provide any guidance as to what could be done to alter the plans so as to receive

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- District Ct. Order, J. App. at 679, n 12.

- Trial Ct. Order, J. App. at 20, 21, 24, 28, 34, 43.

- District Ct. Order at 28.

- Trial Ct. Order, J. App. at 13, 37, 43.

- District Ct. Order, J. App. at 679.

approval.[-] Even though Appellants' prevailed in the state courts after four years, they have offered credible evidence of tremendous financial harm.[-] The existing use of the property had a hotel, but this hotel was unprofitable because it was surrounded by and competing with other properties of which the City had approved newer high-rise developments.

> Focusing the economically viable use inquiry solely on market value or on the fact that a landowner sold his property for more than he paid could inappropriately allow external economic forces, such as inflation, to affect the takings inquiry. Indeed, several courts have found a taking even where the "taken" property retained significant value.[-]

Appellants' primary expectation was to develop the property with "a quality, thoughtful building designed by the most respected architect in the area, and which City staff has approved."[-] In addition, the character of the governmental action is not merely "interference of the regulatory sort,"[-] because Appellants have been uniquely burdened by the "flagrantly" illegitimate and illegal actions taken under the guise of the City's aesthetic ordinances.[-]

[-] Trial Ct. Order, J. App. at 13, 38.

[-] The fact that the forced sale of the property to avoid default resulted in a net profit is not dispositive as to a Takings claim. *See Del Monte Dunes v. City of Monterey*, 95 F.3d at 1435 (Developer's property was sold for $800,000 more than it paid).

[-] *Del Monte Dunes*, 95 F.3d at 1433.

[-] Trial Ct. Order, J. App. at 34.

[-] District Ct. Order, J. App. at 679.

[-] Trial Ct. Order, J. App. at 13, 20, 21, 24, 27-29, 32-34, 43.

The facts mentioned above must be viewed in a light most favorable to Appellants as the non-moving party. In addition, and respectfully, this Honorable Court must not lose sight of the fact that the *Penn Central* Analysis is a balancing test of legitimate interests, and that the South Carolina courts have already decided the issue of whether the City's actions were in fact legal or legitimate.

D. Exactions: Governmental Conditions on Development

The second prong of the takings analysis subjects government exactions, or conditions on private development, to a heightened scrutiny.[-] First, a court must "determine whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city."[-] If the court finds a nexus, it must decide whether the proposed exaction is roughly proportional in nature and extent to the impact of the proposed development.[-] In addition, the burden is on Defendants to justify their actions and conditions.[-]

Defendants imposed multiple conditions on Appellants in order to receive CAB approval – all of which the South Carolina Courts found illegitimate and illegal – including: (1) a prescriptive easement of view over the top of Appellants' structure; (2) a public sidewalk; and (3) greater setback, storm water

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[-] *Dolan v. City of Tigard*, 512 U.S. 374, 390-91, 114 S. Ct. 2309 (1994).

[-] *Id.* (*citing Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837, 107 S. Ct. 3141 (1987).

[-] *Id.* at 391.

[-] *Id.* at 391 n.8.

management, parking garage decoration, and trash compactor requirements than any other property owner.[-]

In a footnote, the District Court summarily stated "this case does not resemble an exaction."[-] However, Appellees attempted to condition CAB approval on these conditions, all of which would require Appellants to dedicate a portion of their interest in the property for public use, and therefore, this holding is contrary to Supreme Court precedent set forth in *Dolan v. City of Tigard*, where:

> [T]he city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel [and,] the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city. In Nollan, supra, we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments.[-]

There can be no question, had the City required Appellants to simply dedicate the airspace over the property or an easement needed for a sidewalk, rather than conditioning the grant of ~~CAB~~ approval to develop the property by effectively requiring such dedications, a taking would have occurred.[-] "Such public access would deprive [Appellants] of the right to exclude others, 'one of

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[-] Damages Brochure, J. App. at 487-89; Trial Ct. Order, J. App. at 16, 24, 41.

[-] District Ct. Order, J. App. at 675-76, n. 10.

[-] *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316-17 (1994).

[-] *Id.*

the most essential sticks in the bundle of rights that are commonly characterized as property.'"[-]

The Trial Court found every condition on development by the City was merely a pretense to protect the ocean view of a neighboring high-rise tower and to arbitrarily re-zone the property to stop any development on one particular piece of property "at any price."[-] As mentioned, the South Carolina Courts found that every condition imposed by City under the guise of aesthetic zoning was illegitimate and illegal.

Thus, in this case the actions of the CAB served no legitimate state interest, and there can be no essential nexus between CAB approval and the conditions imposed.148 As such, the City cannot meet its burden of proving the conditions imposed on development were roughly proportional in nature and extent to the proposed development.[-]

In summary, the City is once again are asking this Honorable Court to undo what the courts of South Carolina have already decided. There has been a taking as a matter of law, because the Trial Court has held that the City's actions were flagrantly illegal, illegitimate, and contrary to Fifth Amendment law.[-]

* * *

[-] *Id.*

[-] Trial Ct. Order, J. App. at 14, 18, 19, 28, 34.

[-] *Dolan v. City of Tigard*, 512 U.S. 374, 386, 114 S. Ct. 2309 (1994) (*citing Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837, 107 S. Ct. 3141 (1987).

[-] *Id.* at 391.

[-] Trial Ct. Order, J. App. at 37.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

FLORENCE DIVISION

Sunrise Corporation of Myrtle Beach, Boulevard Development, L.L.C., and S&H Development, Inc.,	)	CASE NO. 4:99-132-12
Plaintiffs,	)	
vs.	)	
The City of Myrtle Beach, and Mark McBride, Judy Rodman, Rachael Broadhurst, Charles Martino, Wilson Cain, Crain Woods, Larry Bragg, Tom Conn, Tom Davis, Sally Howard, and Fred Rourk, individually,	)	
Defendants.	)	

[ENTERED: September 30, 2003]

AMENDED COMPLAINT
(JURY TRIAL DEMANDED)

The Plaintiffs, complaining of Defendants, would respectfully show and allege unto this Honorable Court as follows:

1. Plaintiffs are incorporated or conducting business in the State of South Carolina, or own real property in the City of Myrtle Beach.

2. Defendant City of Myrtle Beach is a duly incorporated South Carolina municipal corporation.

3. The individual Defendants are members of either the Myrtle Beach City Council or the Myrtle Beach Community Appearance Board, and are residents of Horry County, South Carolina.

4. Venue is proper in Horry County.

5. This Honorable Court has subject matter jurisdiction.

6. Plaintiffs presented plans to Defendant City to build a condominium tower on their property. Plaintiffs presented their plans on three occasions to the Myrtle Beach Community Appearance Board, and on two occasions to the City Council sitting as the appellate panel of the Community Appearance Board. Plaintiffs' plans were rejected each time.

7. Plaintiffs' plans comply with all applicable zoning ordinances, yet the Community Appearance Board and City Council will not give its approval.

FOR A FIRST CAUSE OF ACTION
(42 U.S.C. § 1983)

8. The allegations above are reaffirmed as if repeated verbatim herein.

9. Defendant City's Community Appearance Board, and City Council when sitting as the appellate panel of the Community Appearance Board, is charged with applying specific criteria and stating objective, valid, and constitutional reasons when it rejects a property owner's building plans.

10. When Defendants reject a property owner's building plans, their decision must be supported by the evidence.

11. Defendants do not have the authority to change applicable City zoning ordinances for a specific project,

or disregard its zoning ordinances. Specifically, if Defendants want to change the zoning ordinances there is a valid, approved method for doing so.

12. Defendants may not arbitrarily alter the zoning ordinances on a project-by-project basis simply because they oppose development or want to protect the ocean view of certain City residents.

13. Defendants' reasons for denying Plaintiffs' plans were arbitrary and capricious, totally subjective, without evidentiary support, and against the clear and uncontested evidence.

14. Defendants rejected Plaintiffs' plans, and arbitrarily voted to deny Plaintiffs the ability to even apply for a building permit, even though Plaintiffs' plans complied with all applicable City ordinances.

15. Defendants refused to give any objective reasons as to why they denied Plaintiffs' plans, and refused to give Plaintiffs any guidance as to what could be done to receive Defendants' approval. Therefore, Plaintiffs will never receive Defendants' approval even though Plaintiffs' project complies with all other zoning requirements.

16. Defendants did not review Plaintiffs' plans, and did not look at the over 40 exhibits presented by Plaintiffs. Specifically, City Council voted on the spot and read a prepared statement, clearly indicating the individual City Council members had their minds made up prior to the hearing and never intended to give Plaintiffs a fair and impartial hearing. Also, the Community Appearance Board was improperly constituted at the time it acted, some members had conflicts of interests, and did not properly apply the law to Plaintiffs.

17. Defendants showed a conscious indifference to Plaintiffs' rights.

18. The individual Defendants, acted outside the scope of their authority in rejecting Plaintiffs' plans, and were not acting in a legislative capacity.

19. Defendants have established a policy and procedure to arbitrarily, capriciously, and subjectively deny a property owner's plans for no reason, for subjective reasons, or for political reasons.

20. Defendants have flagrantly and intentionally established this policy and procedure in clear violation of the specific mandate from the South Carolina Supreme Court in *Peterson Outdoor Advertising v. City of Myrtle Beach*, 327 S.C. 230, 489 S.E.2d 630 (1997).

21. Defendants have allowed the Community Appearance Board to be illegally composed, and have taken no action to correct this known problem.

22. Defendants knew or should have known their actions would deprive Plaintiffs of their constitutional rights, and their conduct was objectively unreasonable in light of *Peterson Outdoor Advertising v. City of Myrtle Beach*, 327 S.C. 230, 489 S.E.2d 630 (1997).

23. Defendants deprived Plaintiffs of their civil, due process, equal protection, and Fifth Amendment rights under color of law when they denied Plaintiffs the right to use their property as specifically allowed under Defendant City's zoning ordinances.

24. Defendants' conduct unconstitutionally violated Plaintiffs' clearly established constitutional rights and was a deliberate and intentional scheme to prevent Plaintiffs from enjoying their rights and privileges to use their property.

25. Plaintiffs were damaged as a result of Defendants' wrongful conduct in that they have lost substantial monies as a result of their failure to use their land in accordance with Defendants' zoning ordinances.

26. Plaintiffs are entitled to a judgment against each Defendant, jointly and severally, for the actual damages suffered as a result of the wrongs committed by Defendants.

27. Plaintiffs are also entitled to punitive damages against each Defendant for each Defendants' intentional or reckless, wilful, and arbitrary actions.

FOR A SECOND CAUSE OF ACTION
(Attorney's Fees, Costs, and Expenses)

28. The allegations above are reaffirmed as if repeated verbatim herein.

29. The conduct of Defendants violated the civil rights of Plaintiffs, entitling Plaintiffs to an award of attorney's fees, costs, and expenses.

FOR A THIRD CAUSE OF ACTION
(Inverse Condemnation)

30. The allegations above are reaffirmed as if repeated verbatim herein.

31. Defendants' actions were positive and aggressive, and taken without constitutional, statutory, or regulatory authority.

32. Any further attempts by Plaintiffs to receive approval from the City would be futile.

33. Mayor McBride stated on the record that the City's actions do not amount to a taking. Thus, the City refuses to voluntarily compensate Plaintiffs.

34. Defendants' rejection of Plaintiffs' plans is final action, Plaintiffs have exhausted their administrative remedies, and Plaintiffs only recourse is to seek judicial redress.

35. Defendants actions are in clear violation of the specific mandate from the South Carolina Supreme Court in *Peterson Outdoor Advertising v. City of Myrtle Beach*, 327 S.C. 230, 489 S.E.2d 630 (1997).

36. Defendants' actions have resulted in Plaintiffs being unable to use their property as is specifically allowed under Defendant City's zoning ordinances.

37. Plaintiffs purchased the subject property with the specific intent to develop it in accordance with Defendant City's zoning ordinances. Plaintiffs hired an architect to develop a project that complied with the zoning ordinances of Defendant City, and the architect did develop such a project.

38. Defendants' actions have severely limited the economic use of Plaintiffs' property, and chilled the value of the property to potential purchasers.

39. Defendants' actions have resulted in a taking of Plaintiffs' property, in violation of both the South Carolina and United States constitutions.

40. As a result of Defendants' actions, a portion of Plaintiffs' property remains economically unusable, or unusable for an activity that is otherwise specifically allowed under Defendant City's zoning ordinances. Plaintiffs are entitled to compensation for the loss of their property.

FOR A FOURTH CAUSE OF ACTION
(Taking)

41. The allegations above are reaffirmed as if repeated verbatim herein.

42. Defendants' actions violate the Takings provisions in both the South Carolina and United States Constitutions.

43. Defendants' actions have resulted in a complete taking of Plaintiffs' property, because Plaintiffs can not continue to operate the small motel that is currently on the premises in the competitive Myrtle Beach tourism business.

44. In the alternative, Defendants' actions have resulted in a partial taking of Plaintiffs' property, because a portion of Plaintiffs' property cannot be made economically viable even though the proposed use is specifically allowed under Defendant City's zoning ordinances.

45. If Defendants' decision to deny Plaintiffs' plans is not changed, Defendants' actions have resulted in a permanent taking of Plaintiffs' property. Otherwise, Defendants' actions have still resulted in a temporary taking of Plaintiffs' property.

46. Plaintiffs are entitled to just compensation for Defendants' actions.

FOR A FIFTH CAUSE OF ACTION
(Due Process)

47. The allegations above are reaffirmed as if repeated verbatim herein.

48. Defendants' unconstitutionally vague, subjective, and arbitrary actions allowed it to arbitrarily and

capriciously deny Plaintiffs of their fundamental constitutional rights to develop their property in accordance with Defendant City's zoning ordinances.

49. Defendants' actions must be definite and certain to be valid. The vague and subjective denial by Defendants unconstitutionally permits Defendant City the right to exercise arbitrary powers through an indefinite and uncertain process, containing no standards that can be conformed to and applied rationally.

50. Defendants' actions in denying Plaintiffs' plans were arbitrary and irrational, and based on political pressure rather than legitimate regulatory concerns.

51. The right to develop one's property in accordance with the law is a fundamental right, protected by the due process clauses in both the United States and South Carolina constitutions.

52. As a result of Defendants' actions Plaintiffs have been denied its substantive and procedural due process rights as hereinabove set forth, resulting in substantial damages and injuries.

FOR A SIXTH CAUSE OF ACTION
(Equal Protection)

53. The allegations above are reaffirmed as if repeated verbatim herein.

54. The right to develop one's property, to contract, and to conduct a legal business on one's property are substantial rights.

55. Defendants' conduct in applying the applicable ordinances is discriminatory as applied in that Plaintiffs have been singled out in an arbitrary and capricious manner and have faced subjective, arbitrary, and unreasonable demands and behavior

without any restraint on Defendants, resulting in Plaintiffs being deprived of their rights.

56. Plaintiffs have been treated differently than other developers because of the location of the proposed project and the fact that the project is the first "second row" development.

57. There exists no compelling interest in or rational basis for authorizing Defendants or local governments to arbitrarily and subjectively deny or restrict the legal use of land.

58. Defendants have violated the Equal Protection Clause of the Fourteenth Amendment as hereinabove set forth and as a result, Plaintiffs have been substantially injured, and Plaintiffs are entitled to a judgment against Defendants for its actual damages suffered as a result of the wrongs committed by Defendants.

FOR A SEVENTH CAUSE OF ACTION
(Arbitrary and Capricious Decision Making)

59. The allegations above are reaffirmed as if repeated verbatim herein.

60. Defendants failed to approve the Plaintiffs' plans without any objective justification, thereby being arbitrary and capricious.

61. Defendants failed to inform Plaintiffs what was objectionable about Plaintiffs' plans, thereby being arbitrary and capricious.

62. Defendants' decision to deny Plaintiffs' plans was done without any evidentiary support, thereby being arbitrary and capricious.

63. Defendants failed to review Plaintiffs' exhibits and plans before voting, thereby being arbitrary and capricious.

64. Defendants' decision was against Plaintiffs' clear and uncontroverted evidence, thereby being arbitrary and capricious.

65. Defendant's City Council members repeatedly allowed an improperly constituted Community Appearance Board to vote on Plaintiffs' plans, thereby being arbitrary and capricious.

66. Defendants' arbitrary and capricious actions have proximately caused Plaintiffs substantial damages.

WHEREFORE, Plaintiffs requests the Court:

a. Declare Defendants' actions to be a violation of Plaintiffs' civil rights;

b. Declare Defendants' actions to be an inverse condemnation and/or taking of Plaintiffs' property;

c. Declare Defendants' actions to be a violation of Plaintiffs' substantive and procedural due process rights;

d. Declare Defendants' actions to be a violation of Plaintiffs' equal protection rights;

e. Declare Defendants' actions to be arbitrary and capricious decision making;

f. Award Plaintiffs actual, consequential, and punitive damages against each Defendant;

g. Award Plaintiffs attorney's fees pursuant to 42 U.S.C. § 1988;

h. Order each Defendant jointly and severally liable for the full amount of Plaintiffs' damages; and

i. Award Plaintiffs costs, expenses, interest, and such other and further relief as this Court may deem just and proper.

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Myrtle Beach, South Carolina.

September 27, 2003.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

SUNRISE CORPORATION OF MYRTLE BEACH, BOULEVARD DEVELOPMENT, L.L.C., AND S & H DEVELOPMENT,

PLAINTIFFS,

-VS-

THE CITY OF MYRTLE BEACH, ET AL.,

DEFENDANTS.

CIVIL ACTION NO. 4:99-132

[ENTERED: September 4, 2003]

UNITED STATES COURTHOUSE
FLORENCE, SOUTH CAROLINA
SEPTEMBER 4, 2003

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE C. WESTON HOUCK, UNITED STATES JUDGE

APPEARANCES:
HOWELL V. BELLAMY, III, ESQUIRE
DOUGLAS M. ZAYICEK, ESQUIRE
MYRTLE BEACH, SOUTH CAROLINA
FOR THE PLAINTIFFS

FRANCIS I. CANTWELL, ESQUIRE
WILLIAM B. REGAN, ESQUIRE
L. GREGORY COOK HORTON, ESQUIRE
CHARLESTON, SOUTH CAROLINA
FOR THE DEFENDANTS

RAYMOND D. SIMMONS
1507-B WEST PALMETTO STREET
FLORENCE, SOUTH CAROLINA 29501
843-610-0192

ADMINISTRATIVELY AND IN A QUASIJUDICIAL MANNER AS HERE.

THE COURT: I THINK YOUR 30 SECONDS ARE ABOUT UP.

MR. ZAYICEK: THAT'S ALL I HAVE TO SAY.

MS. CANTWELL: THIS IS A HOUSEKEEPING MATTER, JUDGE.

I HAD SERVED AN AFFIDAVIT YESTERDAY REGARDING THE APPLICATION FOR THE BUILDING PERMIT, AND I WOULD JUST MAKE THAT PART OF THE RECORD.

MR. ZAYICEK: YOUR HONOR, WITH REGARD TO -- I'M KIND OF TAKING THESE THINGS UP ONE AT A TIME IN GOING AROUND CLEANING UP MY NOTES.

WITH REGARD TO WHAT WAS BEFORE, THE SUBJECT MATTER THAT WAS INVOLVED IN THE STATE COURT ACTION, THE DEFENDANTS, IN THEIR NINTH DEFENSE, SAID THE SAME CLAIMS ARE PENDING IN STATE COURT. IN THEIR MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF THEIR SUMMARY JUDGMENT, ON PAGE 24, THEY SPECIFICALLY SAY THAT THE CAUSES OF ACTION ALLEGE AN ABUSIVE DISCRETION ON BEHALF OF THE CITY IN DENYING CAB APPROVAL AND SPECIFICALLY ALLEGE A VIOLATION OF DUE PROCESS AND EQUAL PROTECTION.

AS THESE ISSUES HAVE BEEN ADJUDICATED IN THE LOWER STATE COURT AND ARE CURRENTLY PENDING THERE ON APPEAL, THE DOCTRINE OF RES JUDICATA PRECLUDES THE PLAINTIFFS FROM BRINGING THEM UP IN THIS LAWSUIT.

YOU KNOW, WE PREVAILED. AND, NOW, THEY WANT TO GO BACK AND SAY, WELL, R3S JUDICATA REALLY DOESN'T APPLY. WE WERE GOING TO USE IT AS A SWORD AGAINST THE PLAINTIFFS; BUT NOW THAT WE'VE LOST, THEY WANT TO USE IT AS A DEFENSE. THEY ADMIT IN THEIR MEMORANDUM THAT THESE ISSUES HAVE BEEN ADJUDICATED IN THE LOWER STATE COURT AND, THEREFORE, THE PLAINTIFFS CAN'T ARGUE THEM HERE. REVERSE LOGIC APPLIES.

THE COURT: WELL, WHAT FEDERAL CLAIM WAS ADJUDICATED IN THE STATE COURT?

THERE'S NOT A FEDERAL CASE CITED. THEY DON'T RELY ON FEDERAL LAW IN RESOLVING THE MATTER. THEY RELY ON STATE LAW.

MR. ZAYICEK: YOUR HONOR, THERE WERE NO FEDERAL CITATIONS; BUT THE DOCTRINE OF RES JUDICATA SAYS THEY ARE BARRED FROM RELITIGATING THINGS THAT WERE ACTUALLY DECIDED AND ALSO THOSE THINGS THAT COULD HAVE BEEN DECIDED. IT'S CALLED THE DISCARD DEFENSE.

IF THEY WANTED TO LIMIT THE EFFECT AND SCOPE OF THE STATE COURT PROCEEDINGS, THEY WERE SUPPOSED TO DO THAT IN STATE COURT. NOW THAT THEY HAVE AN ADVERSE RULING WITHOUT ANY LITIGATION AT ALL, YOU KNOW, THEY WANT TO START COUGHING OUT

EXCEPTIONS AND TRY TO LIMIT THE SCOPE AND EFFECT OF THE STATE COURT PROCEEDINGS.

WE PREVAILED. WE WERE NOT REQUIRED --

THE COURT: THERE'S NO QUESTION THAT YOU PREVAILED. AND THERE'S NO QUESTION THAT YOU HAVE VIABLE CLAIMS BASED ON THOSE RULINGS.

BUT MY CONCERN IS WHETHER OR NOT THAT RULING IN THE SUPREME COURT OF SOUTH CAROLINA DISPOSED OF ANY FEDERAL DUE PROCESS CLAIM. AND IN LOOKING AT THE OPINION, I CAN'T SEE THAT IT DOES.

OBVIOUSLY, IF THE SUPREME COURT OF SOUTH CAROLINA RULES ON A FEDERAL CONSTITUTIONAL QUESTION, WE'RE BOUND BY THAT RULING. IT'S KIND OF A STRANGE LAW. BUT THAT'S WHAT THE LAW IS.

BUT I DON'T SEE THAT THEY RULED ON THOSE FEDERAL PROCEEDINGS. NOW, WHY THEY DIDN'T, I DON'T KNOW. I HAVE NOT READ THE BRIEFS THAT WERE SUBMITTED TO THEM.

BUT I DARE SAY YOU DIDN'T ASK THEM TO RULE ON THEM.

DID YOU?

MR. ZAYICEK: YOUR HONOR, THE TRIAL COURT RULED.

THE COURT: THERE'S ONE LITTLE SENTENCE ABOUT THE FIFTH AMENDMENT. THAT'S ALL.

MR. ZAYICEK: AS THE PREVAILING PARTY, WE DON'T HAVE TO PRESERVE ARGUMENTS.

THE COURT: I KNOW. THAT WASN'T MY QUESTION.

IN YOUR BRIEFS TO THE SUPREME COURT OF SOUTH CAROLINA AND TO THE COURT OF APPEALS, I ASSUME THE BRIEFS ARE, ESSENTIALLY, THE SAME THING.

DID YOU ARGUE THAT THE CONDUCT OF THE DEFENDANTS VIOLATED FEDERAL DUE PROCESS LAW?

MR. ZAYICEK: WELL, THEY BROUGHT UP THE FACT THAT --

THE COURT: YOU EITHER DID OR YOU DIDN'T.

MY QUESTION IS: DID YOU ARGUE THAT IN YCUR BRIEF?

MR. ZAYICEK: IT WAS ARGUED BEFORE THE COURT OF APPEALS.

THE COURT: WHAT CASES DID YOU CITE?

MR. ZAYICEK: WE DID NOT CITE ANY CASES. THEY SUBMITTED ONE AND THE SAME --

THE COURT: I DIDN'T ASK YOU WHAT THEY DID. I ASKED YOU WHAT YOU DID.

MR. ZAYICEK: WE DID NOT.

THE COURT: YOU DID NOT CITE ANY FEDERAL LAW --

MR. ZAYICEK: NO, SIR.

THE COURT: --TO SUPPORT THERE WAS A FEDERAL VIOLATION?

I JUST CAN'T SEE HOW WE COULD CONCLUDE THAT THE SUPREME COURT RULED ON THAT.

YOU TELL ME HOW WE CAN DO THAT.

MR. ZAYICEK: THAT KIND OF GOES TO THE FLIP SIDE. IF YOUR HONOR DOES NOT ABIDE BY THAT, THERE ARE STILL QUESTIONS OF FACT THAT WOULD DENY SUMMARY JUDGMENT FROM BEING ISSUED IN THEIR FAVOR, WHICH IS THE FIRST MOTION THAT WE'RE ARGUING HERE.

THE COURT: WHAT QUESTIONS OF FACT ARE YOU SPEAKING OF?

MR. ZAYICEK: YOUR HONOR, I THINK THE BIGGEST ISSUE PRESENTED KNOWING FULL WELL THAT THE CITY WAS GOING TO TRY TO ARGUE THIS AT THE END AND SAY, WELL, WE LOST, WE LOST. BUT, THANK GOODNESS, JUDGE, WE'RE STILL HERE WITH THE DISCRETION.

4 AND I THINK THE CASES THAT YOU CITE, RELY UPON, ARE NOT FACTUALLY – OR CAN BE FACTUALLY DIFFERENTIATED FROM WHAT HAPPENED HERE.

THE COURT: LET ME ASK YOU A QUESTION. THE LAST TIME YOU WERE UP, I DIDN'T OBJECT TO THE CLOSING ARGUMENT YOU MADE; BUT I WOULD HAVE IF, WHERE YOU WERE SITTING OVER THERE, THERE HAD BEEN A JURY. BUT YOU SAID, IF YOU CAN'T RECOVER IN THIS CASE AND THE BOARD SAID SUCH AND SUCH AS THIS, CAN DO PEOPLE IN AND THERE'S NO RELIEF.

LET ME HEAR YOU ON THAT. BECAUSE, WE'RE TALKING ABOUT FEDERAL 1983 CASES. AND LET'S ASSUME THAT I CONCLUDE THAT THE SUPREME COURT OF SOUTH CAROLINA HAS NOT RULED ON

THOSE CLAIMS FOR THE REASONS THAT HAVE BEEN STATED AND THAT, THEREFORE, I HAVE TO DETERMINE HERE WHETHER OR NOT THEY STILL EXIST OR WHETHER SUMMARY JUDGMENT SHOULD BE GRANTED. LET'S ASSUME I DID THAT.

THEN, THE CASE WOULD GO BACK TO STATE COURT AND YOU WOULD HAVE PENDING ALL OF THE STATE CLAIMS ON WHICH I DON'T THINK THE DEFENDANTS COULD SUCCESSFULLY AGUE THERE WASN'T A PRIOR ADJUDICATION THAT WOULD PRECLUDE ISSUES FROM BEING RAISED.

YOU WOULD STILL HAVE A WAY TO RECEIVE JUST

* * *

MR. ZAYICEK: THERE IS NO CLAIM FOR.MONETARY RELIEF UNDER STATE LAW FOR DUE PROCESS, EQUAL PROTECTION.

THE COURT: BECAUSE THERE'S NO 1983 STATUTE.

MR. ZAYICEK: EXACTLY, YOUR HONOR.

THE ONLY STATE CAUSE OF ACTION THAT WOULD BE LEFT WOULD BE AN INVERSE CONDEMNATION CAUSE OF ACTION.

THE COURT: THEN, YOU'VE GOT THE TAKING HURDLE WHICH TO GET OVER, WHICH IS A SUBSTANTIAL HURDLE?

MR. ZAYICEK: YES, SIR.

THE COURT: LET'S TAKE ABOUT 10 OR 15 MINUTES.

(RECESS.)

AS I PREVIOUSLY STATED, THIS IS THE CASE OF SUNRISE CORPORATION OF MYRTLE BEACH, BOULEVARD DEVELOPMENT, L. L. C, AND S AND H DEVELOPMENT, PLAINTIFFS, AGAINST THE.CITY OF MYRTLE BEACH AND ITS MAYOR AND COUNCIL MEMBERS, AS DEFENDANTS.

THE MATTER COMES BEFORE THE COURT ON MOTION OF THE DEFENDANTS FOR SUMMARY JUDGMENT AS TO THE 1983 CLAIMS ASSERTED BY THE PLAINTIFFS. THERE ARE OTHER MOTIONS BEFORE THE COURT, BUT I CHOSE TO HEAR THE MOTION FOR SUMMARY JUDGMENT FIRST; BECAUSE IF THAT MOTION IS GRANTED, THEN THE BASIS OF FEDERAL JURISDICTION WOULD BE LOST AND THE CASE WOULD BE REMANDED TO STATE COURT WHERE THE OTHER PENDING MOTIONS CAN BE DECIDED.

THE 1983 CLAIMS IN QUESTION ARE BASED ON DUE PROCESS, EQUAL PROTECTION UNDER THE FIFTH AMENDMENT. THE PLAINTIFFS ALLEGE BOTH PROCEDURAL AND SUBSTANTIVE DUE PROCESS AND CLAIMS THAT ITS RIGHTS IN THAT REGARD WERE DENIED BY THE DEFENDANTS, ARBITRARILY DENYING THE PLAINTIFFS THE BUILDING PERMIT DESCRIBED IN THE COMPLAINT.

THE ESSENTIAL ELEMENTS OF PROCEDURAL DUE PROCESS AND SUBSTANTIVE DUE PROCESS ARE VERY SIMILAR. BOTH HAVE AS THEIR FIRST ELEMENTS ESTABLISHMENT THAT THE PLAINTIFFS HAD A PROPERTY RIGHT; SECONDLY, THAT THAT RIGHT WAS DENIED. THE SUBSTANTIVE DUE PROCESS CLAIM ADDS A

THIRD ESSENTIAL ELEMENT, STATING THAT THE SAME WAS DENIED WITHOUT DUE PROCESS LAW.

I THINK THAT THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO THE DUE PROCESS CLAIMS BROUGHT UNDER 1983 SHOULD BE GRANTED BECAUSE THE PLAINTIFFS HAVE FAILED TO ESTABLISH ANY EVIDENCE WHATSOEVER A GENUINE ISSUE OF FACT AS TO THE EXISTENCE OF A PROPERTY RIGHT IN THE GRANTING OF THE PERMIT.

AS WE HAVE STATED ON THE RECORD, THE LAW OF THE FOURTH CIRCUIT IS CLEAR. FOR SOMEONE TO HAVE A COGNIZABLE PROPERTY RIGHT IN A BUILDING PERMIT, THE AGENCY IN QUESTION MUST LACK DISCRETION TO DENY THE PERMIT. I READ INTO THE RECORD DURING ARGUMENTS LANGUAGE FROM THE CASE OF GARDNER AGAINST THE CITY OF BALTIMORE, AGAIN A 1992 CASE, REPORTED IN 969 FED 2ND, AT PAGE 63. IN READING FROM PAGE 68, I QUOTE AS FOLLOWS:

THE FIRST STEP IN ANALYZING WHETHER THE CITY DEPRIVED THE APPELLANTS OF SUBSTANTIVE DUE PROCESS IS A DETERMINATION OF WHETHER THEY POSSESSED A PROPERTY INTEREST IN THE PUBLIC WORKS AGREEMENT THAT IS COGNIZABLE UNDER THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE. UNDER THIS APPROACH, WHETHER A PROPERTY HOLDER POSSESSES A LEGITIMATE CLAIM TO AN ENTITLEMENT OF A PERMIT OR APPROVAL TURNS ON WHETHER, UNDER STATE AND MUNICIPAL LAW, THE LOCAL AGENCY LACKS ALL – AND "ALL" IS ITALICIZED – DISCRETION TO DENY ISSUANCE OF THE PERMIT OR TO WITHHOLD ITS APPROVAL. ANY SIGNIFICANT

DISCRETION COVERED UPON THE LOCAL AGENCY DEFEATS THE CLAIM OF A PROPERTY INTEREST.

IT IS CLEAR TO ME THAT, IN THIS CASE, THE BOARD HAD DISCRETION. IN SECTION 601.2 OF THE MYRTLE BEACH IS LISTED THE OBJECTIVES. AND IT SAYS: THE COUNCIL DECLARES THAT THE PURPOSES AND OBJECTIVES OF THE SITE DEVELOPMENT AND THE SITE DESIGN REVIEW PROCEDURES ARE TRUE. AND, THEN, IT LISTS DOWN EIGHT OBJECTIVES. SECTION 601 LISTS THE CRITERIA AND STANDARD BY WHICH THOSE OBJECTIVES ARE TO BE OBTAINED.

IT'S CLEAR TO ME THAT THIS BOARD COULD UTILIZE THOSE SECTIONS, APPLY THOSE SECTIONS TO THIS PERMIT AND, BASED ON THOSE SECTIONS, DENY THE PERMIT. I THINK THAT'S A MEASURE OF DISCRETION. AND I THINK THAT MEASURE OF DISCRETION TAKES AWAY FROM THE PLAINTIFFS THEIR CLAIM THAT THEY HAD A PROPERTY RIGHT IN THIS PERMIT. THEY DID NOT HAVE AN ABSOLUTE RIGHT TO GET THAT PERMIT. THERE WAS DISCRETION IN THE BOARD AND THAT DISCRETION, UNDER FEDERAL LAW, DENIES THEM A CLAIM OF DUE PROCESS BECAUSE THEY HAVE SHOWN NO PROPERTY RIGHT.

IT HAS BEEN ARGUED VERY FORCEFULLY AND VERY CONVINCINGLY THAT THE PETERSON CASE CHANGES THAT. I TOOK A RECESS AND WENT BACK AND READ THE PETERSON CASE AND DISAGREE WITH COUNSEL.

THAT CASE SAYS THAT, BASICALLY, THAT THE BOARD CAN FOLLOW THESE PROCEDURES. THEY CAN FOLLOW THE ORDINANCE AND EXERCISE DISCRETION IN DENYING A PERMIT, BUT THEY JUST CAN'T ARBITRARILY DO IT. THEY CAN'T

JUST DO IT BECAUSE THEY DON'T LIKE IT. IT DOESN'T LOOK GOOD, FOR OBVIOUS REASONS; BECAUSE THAT'S NOT A STANDARD. IT'S ALTOGETHER SUBJECTIVE. NO ONE KNOWS HOW THEY'RE GOING TO BE TREATED. AND THIS ORDINANCE WAS DRAWN IN SUCH A WAY THAT THERE WOULD BE CRITERIA THAT SOMEONE APPLYING FOR A PERMIT OR SOMEONE OPPOSING AN APPLICATION WOULD KNOW THE IMPORTANT FACTORS IN GRANTING THE SAME OR DENYING IT AND HOW THOSE FACTORS WOULD BE APPLIED.

THE SECOND 1983 CLAIM, AS I'VE STATED, IS BASED ON EQUAL PROTECTION. IN ORDER FOR THE PLAINTIFFS TO ESTABLISH THAT CLAIM – AND, IN THIS INSTANCE TO DENY, BECAUSE THE DENIAL OF THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN REGARD THERETO – THEY MUST CREATE A GENUINE ISSUE OF FACT ON THE ISSUE THAT THE GOVERNMENTAL ENTITY INTENTIONALLY TREATED IT DIFFERENTLY -- OR THEM DIFFERENTLY – FROM OTHERS SIMILARLY SITUATED, THAT THERE WAS NO RATIONAL BASIS FOR SAID TREATMENT.

COUNSEL FOR THE DEFENDANTS CITED THE CASE OF SYLVIA DEVELOPMENT CORPORATION AGAINST CALVERT COUNTY, MARYLAND, A 1995 CASE, REPORTED IN 48 FED 3RD, AT PAGE 810, IN SUPPORT OF ITS ARGUMENT THAT THE PLAINTIFFS HAD SHOWN NO BASIS FOR SUPPORT OF THEIR EQUAL PROTECTION CLAIM.

IN QUOTING FROM THAT CASE, THEY READ THE FOLLOWING STATEMENT TO THE COURT; AND I QUOTE: IN SUM, THE MOST APPELLANTS COULD PROVE IN THIS CASE IF THEY WERE PERMITTED TO GO TO TRIAL IS THAT TWO SIMILARLY SITUATED DEVELOPERS WERE

TREATED DIFFERENTLY BY A LOCAL ZONING BOARD WITHOUT AN ADEQUATE EVIDENTIARY BASIS FOR SUCH TREATMENT. APPELLANTS CANNOT SHOW THAT THE COUNTY BOARD'S DECISION WAS BASED, IN WHOLE OR IN PART, ON A DELIBERATE CLASSIFICATION THAT HE WAS CZECH, AN IMMIGRANT, OR A NONRESIDENT. THE DISTRICT COURT THUS WAS COMPELLED TO GRANT SUMMARY JUDGMENT FOR DEFENDANTS ON EQUAL PROTECTION CLAIM.

I THINK THAT THAT FORMS A BASIS FOR THE COURT TO GRANT SUMMARY JUDGMENT ON THE EQUAL PROTECTION CLAIM. I THINK, HOWEVER, THAT WE CAN GO FURTHER AND GLEAN ADDITIONAL LANGUAGE FROM THE SYLVIA CASE THAT SUPPORTS SUCH A HOLDING.

IN THAT CASE, SYLVIA IS DEALING – JUDGE NEURMEYER IS DEALING – WITH A ZONING BOARD THAT ACTED ON POLITICAL MOTIVATIONS; AND HE MAKES IT CLEAR THAT THAT'S THE CASE. HE SAID THAT'S WHAT A DEMOCRATIC SOCIETY IS ALL ABOUT.

AND I CAN'T FIND THE CASE TO QUOTE THAT I WANTED TO READ.

BUT WHAT HE SAYS IN THAT CASE IS THAT THAT, THE FACT THAT THE BOARD RELIED ON POLITICAL REASON, THE FACT THAT THEY REACTED TO PUBLIC SENTIMENT AGAINST THE GRANTING OF THE PERMIT, DID NOT MEAN THAT THERE WAS NO RATIONAL BASIS FOR THE SAME. HE SAID THAT IT MAY BE DETERMINED THAT, UNDER STATE LAW, THERE IS NO RATIONAL BASIS FOR THE DENYING THE CLAIM BUT THAT DOESN'T MEAN THAT, UNDER FEDERAL CONSTITUTIONAL LAW, IT LACKS RATIONAL BASIS. HE SAYS THAT,

IN THAT CASE, THAT RELYING ON IMPROPER POLITICAL CONCERNS IS A RATIONAL BASIS FOR THE ACTIONS OF THE BOARD.

AND, SO, I THINK, FOR THAT REASON, AS WELL AS THE OTHERS STATED REASON, THE EQUAL PROTECTION CLAUSE ARGUMENT OF THE PLAINTIFFS FAILS; AND THERE IS NO GENUINE ISSUE OF FACT IN REGARD THERETO. SUMMARY JUDGMENT MUST BE GRANTED ON THAT CLAIM AS WELL.

THERE'S AN INTERESTING CASE THAT'S REPORTED IN FEDERAL SUPPLEMENT CALLED SEA CABIN ON OCEAN FLOOR FOR HOMEOWNERS, PLAINTIFF, AGAINST THE CITY, REPORTED AT 828 FED SUPPLEMENT, 1241. IT'S A 1993 CASE. IT'S A CASE THAT TOOK PLACE UP IN NORTH MYRTLE BEACH WHEN HURRICANE HUGO DESTROYED SEA CABIN CONDOMINIUM PROPERTY AND THE CITY OF NORTH MYRTLE BEACH WAS PRETTY HIGHHANDED IN THE MANNER IN WHICH IT PREVENTED THE OWNERS OF THAT FROM REBUILDING. IT WAS MY CASE HERE IN FEDERAL COURT. I MADE A RULING OR TWO ON IT; AND THEN A JUDGE FROM NORFOLK CAME DOWN AND HE WAS LOOKING FOR WORK, AND I TURNED THAT CASE OVER TO HIM. AND IT'S HIS OPINION.

BUT IN HIS OPINION, HE DOES CITE RESPONSIBLE LAW, FOURTH CIRCUIT LAW, AS WELL AS UNITED STATES SUPREME COURT LAW. AND WHAT HE SAYS IN THAT CASE IS THAT THE TAKINGS CLAUSE OF THE UNITED STATES CONSTITUTION DOES NOT MERELY PRESCRIBE THE TAKING OF PROPERTY; IT PRESCRIBES THE TAKING WITHOUT JUST COMPENSATION.

THE WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION AGAINST HAMILTON BANK OF JOHNSON CITY, A 1985 UNITED STATES SUPREME COURT CASE, REPORTED IN 473 US AT 172, STATES, ON PAGE 191; AND I QUOTE: IF A STATE PROVIDES AN ADEQUATE PROCEDURE FOR SEEKING JUST COMPENSATION, THE PROPERTY OWNER CANNOT CLAIM A VIOLATION OF THE JUST COMPENSATION CLAUSE UNTIL IT HAS USED THE PROCEDURE AND BEEN DENIED JUST COMPENSATION.

SO, IT APPEARS TO ME, CLEARLY, THAT THAT CLAIM IS NOT RIPE. SOUTH CAROLINA DOES PROVIDE A CAUSE OF ACTION FOR INVERSE CONDEMNATION. THAT CAUSE OF ACTION IS PENDING. IT IS VIABLE. AND UNTIL THAT CAUSE OF ACTION IS DISPOSED OF AND THE RESULT FAILS TO PROVIDE THE PLAINTIFFS JUST COMPENSATION, THAT CLAIM IS NOT RIPE.

IT SEEMS TO BE THAT THERE ARE NO GENUINE ISSUES OF FACT. THERE IS ANY OF THE 1983 CASES CLAIMS AND THAT THE FOREGOING REASONS THE DEFENDANTS' MOTION IN REGARD THERETO IS GRANTED. AND THE CLERK IS HEREBY REQUESTED TO ENTER A SUMMARY JUDGMENT FOR THE DEFENDANTS ON THOSE CLAIMS. AND IT IS SO ORDERED.

NOW, I DON'T KNOW WHERE WE GO FROM HERE. I GUESS THE CASE GOES BACK TO STATE COURT, WHICH MAY NOT BE OF MIND TO TAKE THE CASE. I THINK I CAN TAKE IT. I THINK THAT I CAN EXERCISE THE CHANGE IN THE NAME FOR THEM. I DON'T KNOW IF IT'S SUPPLEMENTAL JURISDICTION OR IF IT'S NOT PENDANT. I THINK THEY TOOK PENDANT AND SUPPLEMENTAL JURISDICTION AND COMBINED THEM INTO

SUPPLEMENTAL. AND I DON'T KNOW WHETHER YOU WANT ME TO DO THAT OR NOT.

BUT I'LL GIVE YOU THE OPPORTUNITY TO THINK ABOUT THAT. I DON'T THINK THAT I HAVE TO DO ANY CERTIFICATION, BUT MAYBE I DO HAVE TO CERTIFY THOSE ISSUES BEFORE YOU COULD APPEAL THEM TO THE FOURTH CIRCUIT. IF THAT WERE THE CASE, I WOULD DO IT. I THINK THEY CONSTITUTE A FINAL JUDGMENT. CERTAINLY, IF THEY REMAND IT, THE CASE WOULD BE A FINAL JUDGMENT IN THIS COURT. BUT WHETHER IT'S A FINAL JUDGMENT IN A SENSE IT'S APPEALABLE OR NOT, I DON'T KNOW.

BUT FOR THE TIME BEING, I'M GOING TO LEAVE EVERYTHING AS IT IS. I'M NOT GOING TO SEND THE CASE BACK TO STATE COURT. I'M GOING TO WAIT AND SEE IF YOU WANT ME TO CERTIFY THERE IS AN APPEALABLE ISSUE TO THE FOURTH CIRCUIT OR WHETHER YOU WANT ME TO KEEP THE CASE HERE OR WHAT.

BUT WITH THE SITUATION REGARDING RES JUDICATA, IT MAY BE BEST TO SEND IT BACK TO STATE COURT AND LET THEM DISPOSE OF THAT.

NOW, THAT HAVING BEEN SAID, I GUESS WHAT I'M SAYING IS, ALSO, THOUGH, I'M ATTEMPTED TO RESERVE IT. IF YOU GO BACK TO STATE COURT AND DON'T GET JUST COMPENSATION, THEN, IT SEEMS TO ME, THAT CAUSE OF ACTION BECOMES RIPE AND COULD BE REINSTATED. I DON'T KNOW HOW LONG I WOULD HAVE TO CHANGE THAT OR WHETHER YOU WOULD HAVE TO INSTITUTE A NEW ACTION OR NOT. I DON'T KNOW.

OKAY. IS THERE ANYTHING ELSE?

MS. CANTWELL: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU VERY MUCH.

(HEARING CONCLUDED.)

CERTIFICATE

I CERTIFY THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE RECORD OF PROCEEDINGS AS HEREINABOVE SET OUT.

/s/Raymond D. Simmons — 1/20/04
RAYMOND D. SIMMONS — DATE
COURT REPORTER

DAMAGES BROCHURE

ST. JOHN'S INN TOWER PROJECT

EXECUTIVE SUMMARY

The property was acquired by the Plaintiff with the specific intent to develop. With excess land, extensive food and beverage facilities, and more than ample administrative space, the St. John's Inn provided a myriad of development opportunities, including, but not limited to: tearing down the existing structures, constructing new facilities to maximize allowable densities, retaining original structures and constructing additional hotel rooms or condos, converting existing hotel rooms to condos, converting the project to time share, operating an on-site rental management company or selling rights to a management company.

In order to determine the extent of the damages suffered by the Plaintiff as a result of the denial of C.A.B. approval, it's important to understand the development strategy which was being employed prior to the denial, how the denial impacted the hotel operation and the Plaintiff, the actions the Plaintiff was forced to take to remain solvent, and the resulting financial impact to the Plaintiff.

A) The Development Strategy: The Plaintiff planned to develop a 98-unit condominium tower. The condos were sold to individuals in a pre-development sales effort. The site for the Tower was to be the area currently used for surface parking for the hotel. The profits from the Tower were to be applied to the debt on the existing 88-unit hotel. The Plaintiff planned to retain ownership of the 88 hotel rooms. The Plaintiff also planned to establish a Property Regime and Home Owners Association, and submit 98 condo units into the regime, providing easements to the common areas of the

hotel. The Plaintiff planned to start an on-site rental management company to provide rental services for the condos in the new Tower, and other condos in the immediate neighborhood. This is a strategy which has been employed with great success by many other developers in this marketplace.

B) Denial of C.A.B. Approval: The denial of C.A.B. approval was completely unexpected, and came less than 30 days from the start of construction of the Tower. The Honorable Stan Cross believed the decision to deny was arbitrary, capricious and without evidentiary support, as noted in his Circuit Court ruling.

C) Financial Hardship Resulting from Denial of C.A.B. Approval: The Plaintiff experienced financial hardship as a direct result of the denial of C.A.B. approval. The hotel and restaurant experienced loss of gross sales. The sales process for condos came to an abrupt halt. Significant out-of-pocket expenses strapped the hotel and the Plaintiff's cash position, rendering the Plaintiff unable to service its debt. The lien placed on the property by the architect further limited the Plaintiffs ability to borrow additional funds. The denial of C.A.B. approval forced the Plaintiff to abandon the development strategy.

D) Defensive Actions Taken by Plaintiff & Financial Impact: The Plaintiff was forced to sell portions of the hotel operation in an attempt to reduce the debt, and to preserve some of the Plaintiffs equity in the property. The conversion and sale of the hotel rooms as Courtyard Condos was an option which the Plaintiff had explored, but rejected. However, the Plaintiff was forced to move ahead with this option to reduce debt. Additional funds were invested by Plaintiff and borrowed to renovate the existing 88-unit hotel. Once renovated, the Plaintiff condominiumized the 88-unit Hotel, and sold converted hotel units as Courtyard

Condominiums. The Plaintiff was also forced to sell the commercial portion of the operation, as 88 is an insufficient number of rental units to operate a stand alone rental management company profitably. The net result of these actions was that the Plaintiff has lost the two main potential profit centers in the development.

E) Conclusion: In conclusion, the Plaintiff acquired the St. John's Inn with the specific intent to develop the property by using the proven method of adding condominium units. In this effort, the Plaintiff hired a local architect, Mr. Tom Pegram, who had successfully designed 37 previous projects. The Plaintiff negotiated with a local contractor, Baiden & Associates, a contract for design-build services. The Plaintiff retained the services of a local consultant with 20 years of experience in condominium development, and engaged Hoffman & Associates as the exclusive marketing company. The Plaintiff had the commitment of a regional lending institution, BB&T, which is a major financial player in the Myrtle Beach market.

Despite choosing the most experienced team available, the Plaintiff found itself caught up in the political machinations of local politics. After appearing before the Community Appearance Board twice, de nova before City Council twice, the Plaintiff's Tower at St. John's Inn project was denied and,- thus, rendered unbuildable.

Upon appeal to Circuit Court Judge Stan Cross, the City of Myrtle Beach was found to have violated its guidelines and ordered to issue an approval for the project. The Judge ruled that the denial should be reversed because the decision to deny is "arbitrary, subjective, without evidentiary support, and a denial of Plaintiffs due process and equal protection rights". As of this writing, the City had been unwilling to do so, and has pledged to draw out the appeals process to the fullest extent possible.

The financial hardships inflicted upon the Plaintiff as a direct result of the denial forced the Plaintiff to abandon the development strategy, and to take defensive actions in an attempt to remain solvent. This unjust denial has cost the Plaintiff the opportunity to ever realize the potential financial rewards due from this project. The Defendants are directly responsible for this loss, and should be held liable to the Plaintiff.

H.F. SPECHT & ASSOCIATES, P.A.
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Association of
Certified Public
Accountants

American Institute of
Certified Public
Accountants

August 13, 1999

Mr. Rusty Helm
Mr. Ronnie Sorrells
c/o Boulevard Development, IXC
Myrtle Beach, South Carolina

Gentlemen:

Pursuant to your request for an independent financial analysis of the Summary of Damages as set forth in your Damages Brochure for the St. John's Inn Tower Project, we are providing to you a description of the scope of our analysis, as well as our related conclusions.

Our analysis was focused primarily on the three components of the Summary of Damages involving the potential profit to be derived from the development and sale of condominium units, the projected income from the operation of the hotel component of the St. John's Inn development, and the projected income from the related on-site rental management services (RMS) operations.

The structure of our analysis involved comparisons of the projected sales/revenues and costs/expenses for each of the aforementioned components with other similar properties and developments with which our firm has

been involved as accountants/consultants. At varying levels, we utilized data derived from five (5) different entities, each involved in the hospitality and rental management industries. All of the comparison subjects are located within the immediate geographic area of the St. John's Inn development. Furthermore, most shared the characteristic of a "mixed" development, that is, a property combining both owned hotel units and managed condominium units, utilizing common front desk operations, reservations systems, and housekeeping services, as well as shared marketing and management activities. A key component of the profitability of such properties is the synergy created by merging hotel/motel operations with rental management services, resulting in higher profit margins due to lower capital and debt service costs.

In performing our analysis, we considered not only base year assumptions with respect to revenue generation and related expense calculations, but also the assumptions related to growth and inflationary factors. Our bases for comparisons on these latter assumptions were derived from data accumulated from the like-kind developments, as averaged for the three most recent reporting years.

The results of our analysis conclude that the projected financial results for the three components of your Summary of Damages listed herein were within the parameters of the other similar properties and developments on which the comparisons were based. Also, the methodologies used in preparing the proformas for each component appeared to be both appropriate and adequate in order to derive a reasonable financial conclusion.

Please be advised of certain limitations on our analysis. Obviously, our conclusions were based on management's stated plans and strategies, and were contingent upon management's abilities to execute accordingly. Also, any

projection of future results rans the risk that market conditions may change or deteriorate, causing the anticipated results to be inaccurate. Our analysis does not provide for any such contingencies.

We trust that the information contained herein is sufficient for your purposes, and that our approach to the analysis was consistent with meeting your objectives. This letter outlining the results of our analysis was prepared solely for use in your role as claimant for damages as specified within the Damages Brochure for the St. John's Inn Tower Project. The letter or any information contained within it are not to be utilized for any other purpose, or to be dissimulated for any reason to any unauthorized third parties not aifiliated with the claimant's action.

/s/H.E. Specht & Associates
Myrtle Beach, South Carolina
August 12, 1999

SUMMARY OF DAMAGES

Development Profit from Tower:	
Exhibit One	$3,120,574
Adjustment:	
Changes made to plan as of 7/30/98	(185,352)
Adjustment:	
Changes made to plan - CAB as of 8/20/98	(138,937)
Net	$2,796,285
Interest Equates to $670 per Diem (8.75%)	
Net Present Value of Debt Free Hotel:	
Exhibit Two	$4,811,462
Offset:	
Projected Profit Courtyard Condos	(943,970)
Net	$3,867,492
Net Present Value Rental Management Company: Exhibit Three	$6,385,828
Offset: Sale of Commercial Unit	(550,000)
Net	$5,835,828
Out of Pocket Expenses as of 7/15/99:	
Exhibit Six	$ 233,509
Interest Equates to $55.98 per Diem (8.75%)	
Loss of Gross Sales Hotel/Restaurant 9/98 thru 3/99: Exhibit Eight	$ 161,794
Interest Equates to $38.79 per Diem	
Pending Account Payable – Pegram Associates/Architect: Exhibit Nine	$ 352,943
Plus Accrued Interest at 8.75% as 7/15/99	25,383
Interest Equates to $84.61 per Diem	
Pending Account Payable – Carter/Consultant:	$ 75,000

Cost to Bond Off Architects Lien as of 7/15/99: Exhibit Nine Interest .Equates to $123.29 per Diem	$ 7,767
Cost to Rent Back Courtyard Condos: Exhibit Eleven	$ 590,812
Potential Accounts Payable: Hoffman Commissions @ 7%	$1,276,576
Potential Accounts Payable: Baiden & Associates @ 10%	$1,167,846
TOTAL	$ 16,391,235

Note: No provision for income tax has been included in the profit calculations because the Plaintiff will be required to pay tax on the settlement amount.

A) THE DEVELOPMENT STRATEGY:

A.1 ACQUISITION OF THE PROPERTY:

Prior to Plaintiffs acquisition of the property, it was determined that the St. John's Inn, with 88 rental units was economically inviable. Eighty-eight units is an insufficient number of units to support the 11,000 SF restaurant/administrative facility, the 2.65 acres of real estate and the resulting property taxes. The Plaintiff met with architect Tom Pegram to determine the development potential of the St. John's Inn prior to committing to purchase the property. Pegram confirmed that under the current zoning (TA120) up to 400 condo units could be constructed on the property.

The Plaintiff purchased the St. John's Inn in May, 1996, for $3,130,000, which was a higher price than comparable second-row properties have historically sold for. The premium price was paid due to the development potential of the property. The Plaintiff purchased the property with the sole intent of developing additional rental units in the form of a condominium regime.

A.2 DECISION TO CONSTRUCT TOWER:

At a purchase price of S3.1M, it would be economically inviable to tear down the existing structures unless 300 - 400 units could be constructed in its place. The Plaintiff determined that the real estate market was not strong enough to absorb 400 second-row condo units, and such a project was beyond its financial comfort level. The Plaintiff decided to retain the current hotel configuration including the 88 hotel rooms, administrative and restaurant structures. They are in excellent condition and have unique architectural identity. The Plaintiff determined that the 30 years of history and tradition associated with the current St. John's Inn structures

were significant, and would play an important role in the marketing of the new condo Tower.

After additional consultation with Pegram, it was determined that there was only one building footprint which would allow the addition of approximately 100 condo units without tearing down the 88-unit hotel. The positioning of the proposed Tower on the property conformed to all building codes and zoning ordinances, including the new rear setback requirement, which the City of Myrtle Beach had doubled less than one year before. The plan was to construct a 14-story tower over the parking lot which served the current hotel. The first five floors would be dedicated to a parking facility large enough to accommodate parking spaces for both the existing hotel and the new condos. The existing hotel would essentially be closed during the construction phase due to safety concerns, and the fact that parking would not be available to existing hotel units. The Plaintiff engaged Tom Pegram as the official architect for the project, Joe Carter as a Development Consultant to assist with the process, Hoffman & Associates as the exclusive marketing agency, and Baiden & Associates as the general contractor.

A.3 FORM OF THE DEVELOPMENT:

The Tower was planned as a condominium regime, consisting of 58 two-bedroom, and 40 three-bedroom condominiums. A Property Owners Association (P.O.A.) would be formed to represent the collective interests of the condo owners. The P.O. A. would assess monthly dues to owners of the individual condos based on square footage. These P.O.A. dues would have reduced the operating expenses of the hotel operation, because there would now be some 98 condo owners paying their portion of common area maintenance, such as: pool up-keep, landscaping, common area utilities, etc. Condo owners who chose to rent their units could do so through the on-

site rental management company, which was to operate in harmony with the front desk operation for the existing hotel.

A.4 PROFIT CENTERS:

i) DEVELOPMENT PROFIT: Projected profits from the development of the Tower were significant, partially because there was no requirement for additional land. The projected profit from the construction of the tower was $2,796,285, well in excess of the existing debt on the hotel operation. The proforma development budget, including construction budgets is attached as Exhibit One.

ii) DEBT FREE HOTEL: After applying the development profit to the existing debt on the hotel, the hotel operation would be debt free. As a result, the Plaintiff would no longer have the $23,532 per month debt service, and the 88-unit hotel operation would be quite profitable. Exhibit Two, attached, demonstrates a twenty year Proforma Income Statement from the debt free hotel operation.

iii) ON-SITE RENTAL MANAGEMENT COMPANY: The Plaintiff planned to start an on-site rental management company, to provide rental management services to owners of the 98 condos. This on-site rental management company would be well positioned to represent a large percentage of the 98 condos at St. John's Inn, as well as other condominiums in the surrounding neighborhood. The rental management company would operate out of the front desk area for the hotel operation. Under this arrangement, the hotel and management company would share certain operating costs, including reservation systems,

laundry facilities, purchasing, data processing, advertising and promotional activities, and management and accounting services. Cost-sharing with the hotel would eliminate much of the overhead expense typically associated with this type of operation. Normally a rental management company would require several hundred units in order to be profitable. However, since this rental management company would have few administrative expenses, it would operate quite profitably. Exhibit Three attached demonstrates a twenty year Proforma Income Statement for the rental management company, including comparable rental histories.

B) CITY'S DENIAL OF C.A.B. APPROVAL:

During the planning and sales process, there was no opposition to the project. The proposed development complied with all city, state and federal guidelines and regulations, including all city zoning ordinances for land designated as TA-120.

Architect Tom Pegram met with city staff on several occasions to discuss the project, and received no indication that the project would be denied a building permit for any reason. As a courtesy, the Plaintiff met with the P.O. A. Board of Directors of Sea Mark Towers to inform the neighbors about the project. The C.A.B. provided only minor suggestions to Pegram during their conceptual review of the project, as outlined in the C.A.B. report from their conceptual review, attached here as Exhibit Four. The Plaintiff then directed Pegram to change the plans to address the concerns expressed by the C.A.B. during the conceptual review, and moved forward dedicating a great deal of additional time and money for the completion of the development plans, including: complete architectural drawings, engineering, test piles, etc.

By the time the C.A.B. and subsequently the City Council denied the building permit, the Plaintiff had dedicated substantial time, effort, and money to the project, and was very close to beginning the mobilization process for construction, as demonstrated by the Construction Bar Graph, attached as Exhibit Five.

C) FINANCIAL HARDSHIP RESULTING FROM DENIAL OF C.A.B. APPROVAL:

C.1 OUT-OF-POCKET EXPENSES:

The Plaintiff spent a great deal of money in the development plan-for the Tower, including: advance sales commissions, extensive advertising and direct mailings, a telephone sales campaign, and architectural, engineering, and legal fees, as outlined in Exhibit Six, attached. These expenses are subject to change and are anticipated to grow as this process continues. These expenses were to be recouped by the Plaintiff upon the first draw of the construction loan.

C.2 LOSS OF REVENUES FOR THE HOTEL OPERATION:

The hotel operation suffered a loss in gross rental revenues beginning the month of September, 1998. As part of the marketing effort to sell condos, the Plaintiff informed the regular guests of the hotel of their intent to develop the condo Tower at the St. John's Inn. This notice took the form of several direct mailings, followed up by direct telephone conversations with sales agents, as illustrated in Exhibit Seven, attached.

Since the hotel was to be partially closed during the construction period, many guests began to look to alternative accommodations for the upcoming months. The Plaintiff also discouraged the hotel's Group Sales Director from booking any group business, or bus tours

into the hotel during the Fall 1998 and Spring of 1999, because the hotel would be essentially closed due to construction of the Tower. The Plaintiff discontinued the regular mailings of hotel brochures and rate charts to the guest history, again anticipating that the hotel operation would be partially closed during construction of the Tower. As a result, the hotel had few advance reservations for the Fall of 1998, through the summer of 1999, and suffered a significant loss of business during those months, as demonstrated in the loss of gross sales versus the prior year in Exhibit Eight, attached. It was these out-of-pocket expenses and loss of rental revenues which put the hotel in a negative cashflow position, and the Plaintiff was unable to service the hotel debt out of the operations of the hotel.

C.3 ARCHITECT LAWSUIT & LIEN:

With the denial of the building permit coming so late in the development process, all of the architectural drawings and engineering for the Tower had been completed. The architect's bill of $352,942.67 was to be satisfied from the first draw of the construction loan, as agreed to by the Plaintiffs lending institution. Since the permit was denied, the Plaintiff's source of funds to pay the architect was gone.

The architect is suing the Plaintiff for the outstanding fee plus accrued interest, and has placed a mechanics lien on the hotel property. This mechanics lien prohibited the Plaintiff from selling off portions of the property, which the Plaintiff subsequently had to do in order to avoid going into default on the debt of the hotel operation. The Plaintiff was forced to bond-off this mechanics lien, incurring interest charges and additional legal bills associated with this lawsuit, as outlined in Exhibit Nine, attached.

The Development Consultant has not filed an official mechanic's lien against the property. However, he has put the Plaintiff on alert that he expects to be compensated for the time and effort which he has dedicated, and continues to dedicate to the project.

D) DEFENSIVE ACTIONS TAKEN BY PLAINTIFF & FINANCIAL IMPACT:

With significant out-of-pocket money already spent, mounting pressures to pay outstanding bills, and reduced revenues coming from the hotel operation, it was becoming increasingly difficult to service the debt. The debt service strangled the cashflow and exhausted the Plaintiffs personal cash position. The Plaintiff, now unable to service the debt for several consecutive months, was faced with the threat of foreclosure and/or bankruptcy. See Exhibit Ten, attached, for a history of debt service. Action needed to be taken in an attempt to preserve the Plaintiffs equity in the property. The Plaintiff's lender agreed to modify the debt structure, to allow the Plaintiff to restructure the development plan in an attempt to reduce the debt.

D.1 ATTEMPTS TO SELL THE HOTEL/PROJECT:

The Plaintiff attempted to sell the hotel and the development plans. However, because of the uncertainty now surrounding the project, and the fact that 88 is an insufficient number of rental units to operate the St. John's Inn profitably, there was no interest from the investment community. There was also limited time to market the property, as the Plaintiffs debt position continued to grow. The Defendants remained steadfast in their opposition to the project.

D.2 CONVERSION & SALE OF HOTEL UNITS:

The conversion and sale of the hotel rooms as Courtyard Condos is an option which the Plaintiff had explored, but rejected because of weak pre-sales. The Plaintiff had set a pre-sale requirement of at least 50 converted units before committing to sell any of the Courtyard units. The decision was made to apply the profits from the Tower to the existing debt on the hotel, and to operate the hotel debt free, instead of converting and selling the units as Courtyard Condos.

With the Plaintiffs debt in default, and mounting pressures to pay outstanding bills and to reduce the debt, the Plaintiff reluctantly agreed to convert and sell the Courtyard Condos. The Plaintiff invested and borrowed additional funds to renovate the hotel rooms, and continued to market the individual hotel rooms as condos. The Plaintiff established a property regime and submitted the 88 hotel units, reserving the right to submit the condo Tower at a later date. The lender agreed to the strategy, and released individual units as they sold. Net proceeds from the sale of Courtyard Condos were applied to reduce the debt.

Additional funds had to be borrowed to bond off the mechanics lien which the architect had placed on the property. To date, the Plaintiff has sold only 37 of the Courtyard Condos, and continues to own 51 of these units, which it has placed on a rental management program with the new owner of the commercial unit. The sale of the Courtyard Condos means that the Plaintiff has lost the ability to operate the 88-unit hotel, and the anticipated stream of cashflow associated with that asset. Exhibit Two illustrates the Net Present Value of the anticipated cashflow.

> RENT BACK CLAUSE: Since the footprint for the Tower is on the surface parking for the Courtyard Condos, the Plaintiff made a provision in the Master Deed of the Property Regime to rent back

the Courtyard Condos from the individual owners during the construction of the Tower. The Plaintiff has agreed to pay the owners an amount equal to 54% of the historic gross revenues. This will be necessary because there will be very limited parking for the Courtyard Condos during the construction cycle for the Tower. See Exhibit Eleven, attached.

D.3 SALE OF THE COMMERCIAL UNIT (C-1):

Eighty eight (88) rental units, neither as a full-service hotel nor rental management company could be operated profitably on this site. With this knowledge, and the fact that the legal process to obtain approval to build the Tower was many months if not years away, the Plaintiff had no option but to sell the commercial unit.

A large rental management company purchased the commercial unit, including the restaurant and lounge. The purchaser has several hundred rental units in the immediate area. The purchase price was $550,000, with the purchaser agreeing to pay an additional $5,000 per additional condo, if the Plaintiff eventually builds additional units on the property. The sale of the commercial unit means that the Plaintiff has lost the ability to operate the on-site rental management company, and the anticipated stream of cashflows associated with operating that asset. Exhibit Three illustrates the Net Present Value of the anticipated cashflows.

D.4 RETURN OF EARNEST MONEY DEPOSITS ON PRE-SALE CONTRACTS:

The Plaintiff had a contractual obligation with the buyers of the Tower units which obligates the developer to complete the units within two years of the date of the

Purchase Agreement. The builder estimates the construction cycle to take twelve months, as previously illustrated in Exhibit Five. Based on the City's denial and failure to comply with Judge Cross's order to issue C.A.B. approval, on 07/19/1999, the Plaintiff returned the 20% earnest money deposits, which were being held in escrow from the pre-sale contracts on the Tower. The builder informed the Plaintiff that due to strong demand for construction services in Myrtle Beach, he would be unable to construct the Tower this year, and that the cost of construction would be 10-15% higher.

E) CONCLUSION:

In conclusion, the Plaintiff acquired the St. John's Inn with the specific intent to develop the property by using the proven method of adding condominium units. In this effort, the Plaintiff hired a local architect, Mr. Tom Pegram, who had successfully designed 37 previous projects. The Plaintiff negotiated with a local contractor, Baiden & Associates, a contract for design-build services. The Plaintiff retained the services of a local consultant with 20 years of experience in condominium development. The Plaintiff had the commitment of a regional lending institution, BB&T, which is a major financial player in the Myrtle Beach market.

Despite choosing the most experienced team available, the Plaintiff found itself caught up in the political machinations of local politics. After appearing before the Community Appearance Board twice, de nova before City Council twice, the Plaintiffs Tower at St. John's Inn project was denied and, thus, rendered unbuildable.

Upon appeal to Circuit Court Judge Stan Cross, the City of Myrtle Beach was found to have violated its guidelines and ordered to issue an approval for the project. The Judge ruled that the denial should be reversed because the decision to deny is "arbitrary, subjective, without

evidentiary support, and a denial of Plaintiff s due process and equal protection rights". As of this writing, the City had been unwilling to do so, and has pledged to draw out the appeals process to the fullest extent possible.

The financial hardships inflicted upon the Plaintiff as a direct result of the denial forced the Plaintiff to abandon the development strategy, and to take defensive actions in an attempt to remain solvent. This unjust denial has cost the Plaintiff the opportunity to ever realize the potential financial rewards due from this project. The Defendants are directly responsible for this loss, and should be held liable to the Plaintiff.

ARTICLE VI. COUNTY APPEARANCE BOARD

Section 601. Findings and objections.

601.1 *Findings.* The city council finds that excessive uniformity, dissimilarity, inappropriateness or poor quality of design in the exterior appearance of structures and signs and the lack of proper attention to site development and landscaping in the business, commercial, industrial, and certain residential areas of the city hinders the harmonious development of the city, impairs the desirability of residence, investment or occupation in the city, limits the opportunity to attain the optimum use and value of land and improvements, adversely affects the stability and value of the property, produces degeneration of property in such areas with attendant deterioration of conditions affecting the peace, health and welfare of the city, and destroys a proper relationship between the taxable value of property and the cost of municipal services therefor.

601.2 *Objectives.*The council declares that the purposes and objectives of site development requirements and the site design review procedures are to:

(a) Encourage originality, flexibility, and innovation in site planning and development, including the architecture, landscaping, and graphic design of said development;

(b) Discourage monotonous, drab, unsightly, dreary and inharmonious developments;

(c) Conserve the city's natural beauty and visual character and charm by insuring that structures, signs, and other improvements are properly related to their sites, and to surrounding sites and structures with due regard to the aesthetic qualities of the ocean front, beaches, sand dunes,

swashes, lakes, and vegetation and that proper attention is given to the exterior appearance of structures, signs, and other improvements;

(d) Protect and enhance the city's appeal to residents, tourists, and visitors and thus support and stimulate business and industry and promote the desirability of investment and occupancy in business, commercial and industrial properties;

(e) Stabilize and improve property values and prevent blighted areas and, thus, increase tax revenues;

(f) Achieve the beneficial influence of pleasant environments for living and working on behavioral patterns and, thus, decrease the cost of governmental services;

(g) Foster civic pride and community spirit so as to improve the quality and quantity of government and in growth, change, and improvement;

(h) Sustain the comfort, health, tranquility, and contentment of residents and attract new residents by reason of the city's favorable environment; and thus, to promote and protect the peace, health and welfare of the city.

Section 602. Organization.

There is hereby established a community appearance board whose members, term, officers, and manner of transacting business shall be as follows:

602.1 *Membership and qualifications.* The board shall consist of nine members appointed by the city council. Members shall serve without pay, but may be reimbursed for any expenses incurred while representing the board. At all times, a minimum of six of the nine appointed members

shall be residents of the city and shall be drawn from the community at large; provided that one member shall be representative of the sign industry, one member shall be an architect and one member shall be a representative of the landscaping industry. Any member who is not a city resident shall be required to actively practice business within the city. Two additional members may be appointed as alternates who will be called upon to serve only in the absence of one or more of the primary nine appointed members. The mayor and the chairman of the planning and zoning commission shall be ex officio nonvoting members. (Ord. No. 91-39, 12-10-91)

602.2 *Term.* The members of the community appearance board shall be appointed by the city council for a maximum of two terms of four years. However, three of the original members shall be appointed for terms of two years and four for four years. Thereafter all terms shall be four years. The terms shall expire on the last day of the calendar year.

602.3 *Vacancies.* Any vacancy of the community appearance board shall be filled by the city council by appointment as herein provided for original appointments to fill the unexpired term. The city council may remove any member of the board for misconduct or nonperformance of duty.

602.4 *Officers.* The community appearance board shall elect a chairman and a vice-chairman from its membership. The chairman and vice-chairman shall serve two-year terms and shall not serve more than two consecutive two-year terms. The vice-chairman shall exercise and perform all of the duties of the chairman during any absence, disability or disqualification of the

chairman. In the absence of both the chairman and vice-chairman, the remaining board members shall select an acting chairman. The city manager shall appoint a member of the city staff to act as advisor to the board and to coordinate and prepare the meeting agenda for the board. The manager shall also assign someone to attend all board meetings who shall be responsible for electronically recording all board proceedings and preparing detailed minutes. (Ord. No. 91-39, 12-10-91)

602.5 *Quorum and voting.* A quorum shall consist of five voting members. The concurrence of a majority of the members of the board present and voting shall be necessary to determine any question before the board. The ex officio members shall not vote.

602.6 *Meetings and records.* Meetings of the board shall be held monthly and at the call of the chairman. Meetings shall be held only after public notice has been given, and no action shall be taken except at a meeting duly assembled and open to the public. The board shall keep minutes of its proceedings and such minutes shall be public records.

602.7 *Rules.* The board may adopt and amend from time to time rules to govern the conduct of its business, consistent with the provisions of this ordinance.

602.8 *Attendance by applicant.* The applicant shall be given at least three days prior notice by the director of construction services of the date and time his application will be considered by the board. The applicant may attend and/or may be represented by an agent or attorney at the

meeting. If the applicant does not attend and is not represented at the meeting, the board shall consider the application based on the available information and shall approve, disapprove or approve with conditions the same as if the applicant were present or represented.

Section 603. Jurisdiction, duties and powers of the board.

603.1 Except for single-family residences on" nonoceanfront properties in R-15, R-10, and R-7 districts and amusement devices or rides in the AC-3 district, no building permit shall be issued for a new building or for the erection or construction of a sign, or for physical changes affecting exterior appearances including fences, walls, landscaping, or signs until the plans, drawings, sketches, and other documents required under section 605 have been reviewed and approved by the board in conformity with the criteria specified in section 604. Construction, site development and landscaping shall be carried out in substantial accord with the plans, drawings, sketches, and other documents approved by the board, unless altered with board approval. Nothing in this subsection shall be construed to prevent ordinary repair, maintenance and replacement of any part of the building or landscaping which does not involve a change from the goals and objectives of section 601. Proposed "substantial changes" shall be submitted to the building department for processing to the board. (Ord. No. 94-20, 3-22-94)

603.2 Other duties:

(a) Conduct an annual design awards program;

(b) Identify "problem areas" in need of improvement (e.g., existing fishing piers, older amusement areas, downtown, etc.) and work with property

owners and staff on a voluntary basis to suggest and implement needed improvements;

(c) Suggest "beautification" capital improvement projects to city council;

(d) Designate "buildings of outstanding architectural merit" and seek adaptive reuse or special incentives for maintaining their original appearance through zoning ordinance modifications;

(e) Formulate and refine voluntary supplementary guidelines for new development;

(f) Upon request of council, conduct special appearance studies which would result in special design guidelines for areas such as the cabana section, the convention center vicinity, the Myrtle Square area, etc.; and

(g) Recommend to the council for adoption an ordinance setting forth minimum design standards.

Section 604. Criteria and standards.

604.1 The following standards shall be utilized by the board in reviewing the plans, drawings, sketches and other documents required under section 605. These standards are intended to provide a frame of reference for the applicant in the development of site and building plans as well as a method of review for the board. These standards shall not be regarded as inflexible requirements. They are not intended to discourage creativity, invention, or innovation. The specification of one or more particular architectural styles is not included in these standards.

604.1.1 *Preservation of landscape.* The landscape shall be preserved in its natural state, in so far as practicable, by minimizing tree and soil removal, and any grade changes shall be in keeping with the general appearance of neighboring developed areas.

604.1.2 *Relation of proposed buildings to environment.* Proposed structures shall be related harmoniously to the terrain and to existing buildings in the vicinity that have a visual relationship to the proposed buildings. The achievement of such relationship may include the enclosure of space in conjunction with other existing buildings or other proposed buildings and the creation of focal points with respect to avenues of approach, terrain features, or other buildings.

604.1.3 *Drives, parking and circulation.* With respect to vehicular and pedestrian circulation, including walkways, interior drives, and parking, special attention shall be given to location and number of access points, general interior circulation, separation of pedestrian and vehicular traffic, and arrangement of parking areas that are safe and convenient and, in so far as practicable, do not detract from the design of proposed buildings and structures and the neighboring properties.

604.1.4 *Surface water drainage.* Special attention shall be given to proper site surface drainage so that removal of surface waters will not adversely affect neighboring properties or the public storm drainage system.

604.1.5 *Utility service.* Whenever feasible, electric, telephone, and other utility lines shall be

underground. Any utility installations remaining above ground shall be located so as to have a harmonious relation to neighboring properties and the site. The proposed method of sanitary sewage disposal from all buildings shall be indicated.

604.1.6 *Advertising features.* The sue, location, design, color, texture, lighting and materials of all exterior signs and outdoor advertising structures or features shall not detract from the design of proposed buildings and structures and the surrounding properties.

604.1.7 *Special features.* Exposed storage areas, exposed machinery installations, service areas, truck loading areas, utility buildings, and structures and similar accessory areas and structures shall be subject to such setbacks, screen plantings, or other screening methods as shall reasonably be required to prevent their being incongruous with the existing or contemplated environment and the surrounding properties.

604.1.8 *Application of design standards.* The standards of review outlined in 604.1.1-607.1.7 shall also apply to all accessory buildings, structures, exterior signs and other site features, however related to the major buildings or structures.

604.2 The board shall also be guided by the objectives of section 601, and such objectives shall serve as additional criteria and standards.

604.3 Unless otherwise authorized under this ordinance, the board shall not have the authority to waive or modify the site development requirements of

this ordinance, or the requirements of any other applicable city ordinance.

Section 605. Procedure.

605.1 *Submission of documents.*

605.1.1 *Concept plan review.* An applicant must receive a concept plan review by the board upon submitting his plans to the construction services department for permit review. This review will normally be scheduled at the next scheduled board meeting after submission except that at least four normal workdays will be required between the date of submission and the board meeting. For purposes of satisfying the conceptual portion of the overall review process, the applicant shall provide the construction services department the following materials:

605.1.1.1 Completed application form;

605.1.1.2 Three stamped surveyed plat plans prepared within six months of the application filing date; (Ord. No. 93-66, § 1, 10-26-93)

605.1.1.3 Three sets of surveyed site plans including:

Proposed footprint of building(s),

Proposed parking area(s),

Proposed buffer area (buffering and landscaping all vehicular use areas and incompatible land uses),

Location inserts,

Parcel boundaries (all property lines shown);

605.1.1.4 Existing tree/plant material survey for site indicating trees to be removed and to be saved;

605.1.1.5 Elevation(s) of proposed building;

605.1.1.6 Photographs of site and adjoining properties.

The construction services staff shall examine those materials to ensure that they satisfy submission requirements and arrange for their presentation before the board. Immediately upon receipt of these materials by the plans expediter, both the zoning administrator and the city planner will be given one full set for pre-CAB review. This review shall be completed within two normal working days of receipt to ensure that projects which go before the board are compliant with zoning and planning standards. The board shall approve or reject all or part of the applicant's general plan within the time limits required for final approval (see section 605.2). The board's recommendations shall be taken into consideration during the permit review process. A copy of all materials presented for conceptual review, together with minutes of that review, shall accompany the final plans at the time of their review.

Accelerated review option. Applicants who opt to present the material required in section 605.1.2, final plan review, at the time of conceptual review may require only one review if the board gives final approval at concept plan review and if the exterior of the project is not subsequently changed in any way. If, subsequent to board approval, any changes are made or required which would affect the exterior appearance of the

project, the changes must be submitted to CAB for approval prior to issuance of a building permit.

605.1.2 *Final plan review.* Applicants for structural or site plan permits must receive a final plan review by the board. The construction services department shall arrange and schedule final plan reviews. Materials listed below shall be submitted to the construction services department in six copies for all projects seeking permits:

605.1.2.1 A site plan drawn to scale, showing the proposed layout of all structures and other improvements including, where appropriate, driveways, pedestrian walkways, landscaped areas, fences, and railroad tracks. The site plan shall indicate the location of entrances and exits and the direction of traffic flow into and out of off-street parking and loading areas, the location of each parking space and loading berth and areas of turning and maneuvering vehicles. The site plan shall indicate how utility service and drainage are to be provided.

605.1.2.2 A landscape plan, drawn to scale, showing the location of existing trees proposed to be removed and to be retained on the site, the location and design of landscaped areas, the varieties and sizes of trees and plant materials to be planted on the site, other pertinent landscape features, and irrigation systems required to maintain trees and plant materials.

605.1.2.3 Architectural drawings or sketches, drawn to scale, including floor plans of sufficient detail to permit computation of

yard requirements and showing all elevations of the proposed structures and other improvements as they will appear on completion of construction.

605.1.2.4 Specifications as to type, color and texture of exterior surfaces of proposed structures.

605.1.2.5 A site plan drawn to scale, showing the location, size, design, material, color and methods of illumination of all exterior signs.

605.1.2.6 Photographs of any existing conditions of buildings, signs, landscape features, or unusual topographical features.

605.1.3 *Sign submission requirements.* Applicants for sign permits must receive final plan review by the board. The construction services department shall arrange and schedule final plan reviews. The materials listed below shall be submitted to the construction services department for all signs seeking permits:

605.1.3.1 One scale drawing of plat (1/4" to 1').

605.1.3.2 Two site plans drawn to scale, indicating sign location and all existing improvements on property. Fro free-standing signs and billboards a landscape plan showing exact location and plant types shall be included on the site plan.

605.1.3.3 Two drawings of the proposed sign, lettering and graphics, drawn to scale of at least one-quarter inch to the foot including any support structure. Colors of the proposed sign shall be indicated on the drawing, and actual color samples shall also

be furnished. Any proposed illumination techniques shall be indicated on the drawing.

605.1.3.4 Color photographs of the existing site, including the area of the sign location and the building elevations.

605.1.3.5 Property owner's or authorized agent's written authorization to install the sign. (Ord. No. 91-39, 12-10, 91)

605.2 *Action by board.* Within 60 days from the date of submission to the building department, the board shall approve, approve with conditions, or reject the plans of the applicant. Failure of the board to so act within the 60-day period shall constitute approval, unless the applicant consents to an extension of time.

605.3 *Effective date of decisions.* A decision of the board shall become effective immediately.

605.4 *Time limit on approval.* Design review approvals shall be void after six months unless a building permit has been issued and substantial construction pursuant thereto has taken place.

Section 606. Appeals from board decisions.

An applicant who is aggrieved by any decision of the community appearance board may appeal that decision to city council by filing with the city manager a petition in writing setting forth that a decision of the board was in error, in whole or in part, and specifying the grounds on which the appeal is based. Such petition shall be presented to the city manager within 30 days after notice of the board's decision is received by the applicant. When the board's decision is announced at a meeting of the board in the presence of the applicant or the applicant's representative, the 30-

day period for filing an appeal shall begin at the time of such announcement. If the board's decision is not announced to the applicant or the applicant's representative at the meeting, the 30-day period shall begin upon receipt of written notice of the board's decision by the applicant.

606.1 *Hearing before city council.* City council shall hear the appeal within 45 days of receipt by the city manager. The hearing may be conducted at a regular meeting of city council or at a special meeting scheduled for the purpose. Public notice of the hearing shall be given in publication in a newspaper of general circulation in Myrtle Beach not less than ten days before the hearing. In addition, city council shall cause the date, time, place and nature of the hearing to be posted conspicuously on the property.

606.2 *De novo hearing.* The hearing before city council shall be de novo. Any party in interest, including the applicant or its representatives, representatives of the community appearance board, and neighboring property owners may be heard. Any party wishing to be heard on the appeal shall notify the city manager, in writing, no less than three days prior to the scheduled hearing. The council shall not be limited to consideration of information considered, by the board, but may accept any information or opinion which, in the opinion of council, is relevant to a proper determination of the appeal. Each party in interest, regardless of the number of persons which speak for it, shall be limited to ten minutes to present its case. This time limit may be extended by council upon written request received no less that three calendar days before the hearing. If the

time limit is extended for one party, it shall be extended for all parties.

606.3 *Hearing procedure.* The applicant bringing the appeal shall have the burden of showing that the decision of the board was not correct. The applicant shall, therefore, present its case first and shall be required to include in its initial presentation all of the reasons which it believes would justify the council to make action different from that taken by the board. The applicant shall have no further opportunity to present its case except that it may reserve up to one-third of its total allotted time to reply to material presented by other interested parties which appear and participate in the hearing. Each party, other than the applicant, shall have only one opportunity to present its arguments to council. The mayor or other presiding council member shall determine the order in which parties other than the applicant will appear. City council may consider all of the testimony and other evidence presented to it and decide the applicant's case on its merits applying the criteria and standards contained in this article; provided, however, that any decision which would have the effect of reversing or modifying the decision of the community appearance board shall require the affirmative vote of at least four members of council to be carried. If at least four votes are not cast to reverse or modify the decision of the community appearance board, its decision shall be affirmed.

City council shall decide the appeal within 45 days after the hearing. Council shall deliberate and vote in public session except that an executive session may be held, after proper vote

of council, to receive a legal briefing on issues related to the appeal. All interested parties shall be given written notice at least three calendar days before any meeting at which council may act on the appeal. No input will be permitted from parties or the public related to the appeal at such meeting. Only those members of council who were present at the hearing of the matter may vote on the decision.

The decision of the council shall be provided in writing to the applicant, and all other parties which appear and participate in the hearing.

Section 607. Appeals from the decision of city council.

Any person who may have a substantial interest in any decision of the city council related to an appeal from a decision of the community appearance board may appeal from the council's decision to the circuit court in and for Horry County *by* filing such appeal in writing with the clerk of such court within 30 days after the city council's decision is rendered. Such written appeal shall set out plainly, fully and distinctly wherein the city council's decision is contrary to law.

STATE OF SOUTH CAROLINA) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS
Boulevard Development and St. John's Inn,	CIVIL ACTION NOS. 98-CP-26-3516 98-CP-26-4311
Plaintiffs/Appellants,	MOTION TO ALTER OR AMEND JUDGMENT OR FOR A NEW TRIAL
vs.	
The City of Myrtle Beach,	
Defendant/Respondent.	

[ENTERED: June 1, 1999]

The Defendant, pursuant to Rule 59, S.C.R.C.P., respectfully moves for an Order altering or amending the judgment rendered herein, or alternatively, a new trial.

The basis of the motion is that the Order issued by the Court on May 13, 1999 incorporates numerous factual findings which are either incorrect, unsupported by any evidence in the record, or irrelevant to the issue before the court, and the legal conclusions rendered do not comport with precedent of this state, all as are more fully set forth hereafter.

The Defendant submits the following matters require the Court to alter or amend its Order issued on May 13, 1999 or alternatively, award the Defendant a new trial:

FACTUAL FINDINGS

Defendants submits the following matters should be amended or struck from the Order:

1. p. 2, ¶ 2: Contrary to the Court's finding, it was not "uncontested" that Plaintiffs' plan complied with all city ordinances, as Plaintiffs were required to secure CAB

approval per city ordinance. Additionally, contrary to the court's inference, Defendant, sitting as the CAB, was not required to "introduce any exhibits to contradict any of the Plaintiffs' exhibits", as stated in paragraph 2, on page 2 of the Order.

2. p. 2, ¶ 3 renders a factual finding that the basis of the Defendant's denial had no evidentiary support in the record. It is submitted that ample evidence in the record exists to support the Defendant's denial, as will more fully be argued hereafter.

3. p. 3, ¶ 1: Contrary to the Court's finding, the Plaintiff never stated they would make any change suggested by the CAB; instead, Plaintiff presented nearly identical versions of the project, and essentially told the CAB it could pick the one it wanted. See: September 3, 1998 Hearing, Testimony of Pegram, p. 32, 1.11-23; p. 41, 1.21-25.

4. p. 3, ¶ 3: The record reflects, unequivocally, that residents of Sea Mark Tower expressed numerous objections to the plans, separate and distinct from any motive to protect ocean views. See by way of example: September 3, 1998 Hearing: p. 60, 1. 2-5; p. 73, 1. 10-14; November 10, 1998 Hearing; p.48, 1. 17-20; p. 49, 1. 5-8; p. 61, 1. 2-7, 14-20.

5. p. 3, Last ¶ and continuing onto p. 4: Whether or not the architect, Mr. Pegram, determined that the project would be harmonious with other projects in the area is not relevant to the issue raised, as that is not his charge. It the responsibility of the CAB, not a project architect, to review a project for compliance with CAB criteria.

6. p. 4, Footnote #3: While the Plaintiffs' building would not be the first of its kind in the subject neighborhood, the evidence does not support a factual finding that high rises are "all around Plaintiffs' property". If any, the

evidence only suggests that there are other high rises in the vicinity.

7. p. 4, Last ¶ and continuing onto page 5: The City zoning and planning officials did not assure the Plaintiffs that their plans complied with all city ordinances, the reason being that CAB approval is a part of city ordinances and the Plaintiffs' knew they were required to secure that approval. Additionally, the finding by the Court that there was no evidence indicating that the plans would not be approved is irrelevant, as it is not the prerogative of the staff to give, condition or comment on the likelihood of CAB approval, and there is no evidence they did so.

8. p.5, Footnote 10: This footnote has no relevancy to any matter raised on this appeal, is prejudicial, and should be struck from the Order.

9. p. 5, Sec. A: The discussion by the Court of any appearance before the appointed CAB is totally irrelevant to the issues raised on this appeal, the reason being that, pursuant to the CAB ordinance, the review by the appointed CAB board is not a final, and it is not binding on the council who hears matters *de novo*. As importantly, neither the appointed CAB, nor any of its individual members, are parties to this action, and thus any decision rendered by that body or those individuals is not before the court.

10. p. 5, ¶ 1: The Court cites testimony of Lyle Kershner, city employee, as to the purpose of conceptual review. This is error, as the ordinance speaks for itself as to the purpose of conceptual review, and neither the CAB nor the Plaintiffs are bound by what a staff member says is this regard.

11. p. 6, ¶ 1: The Court implies that the renderings presented to the CAB at the August 20 meeting

"satisfied" the CAB's concern regarding about the rear elevation of the building. *There is absolutely no evidence* in the record to substantiate this finding. Further, simply because a matter is raised at conceptual review such does not limit the CAB to considering only that matter when presented with a project in its entirety. Otherwise, there would be no need for any further proceeding after conceptual review, and the ordinance in no way suggests, must less supports, this procedure.

12. p. 7, ¶ 1: The Court finds there was no evidence introduced at the CAB hearing, or in these appeals, that supports the findings of the appointed CAB. The Court further finds that the Defendant did not attempt to defend the appointed CAB's first denial. These findings by the Court are totally and completely irrelevant, and prejudicial. It was not the responsibility of this Defendant to defend what the appointed CAB did. It was the responsibility of this Defendant to defend only what it did, and it did so.

13. p. 7, ¶ 2: Again, it is not the responsibility of this Defendant to defend what the appointed CAB did. Additionally, any reference to "good faith actions" taken by the Plaintiffs is irrelevant, as their efforts are not the issue before the Court; rather, the plans they submitted are.

14. p. 7, ¶ 3: The Court's finding that the Plaintiffs introduced other exhibits to "rebut" the appointed CAB denial is true, but is inconsistent with the Court's previous finding that approval by the appointed Board should have been "automatic" after conceptual review, as set forth on page 6 of its Order.

15. p. 8, ¶ 1 carried over from p. 7: Contrary to the Court's finding, there was evidence to indicate a potential of run-ff into the swash. Council made clear to the Plaintiff that it had concerns regarding the swash, and

specifically asked if the City staff had evaluated the effect of the project on the aquifer and was advised that staff did not have that information. See: September 3, 1998 Hear, p. 101, 9-13. The record reveals that an exfiltration piping system was to be used which would dispose of surface water into the ground. The record also reveals that this site adjoins a swash of critical environmental importance which is lower in the quality, as opposed to the quantity, of storm water being exfiltrated underground.

16. p. 9, Footnote 26: The discussion in this footnote with respect to the existence of other garages in the vicinity having "blank walls" is irrelevant, as the record devoid of any evidence as to when these garages were built, and is devoid of any evidence that each garage is similarly situated as the subject garage, to wit: within 52 feet of residential balconies.

17. p. 9, ¶ 1: The record is devoid of evidence to substantiate the finding that the staff asked the Plaintiffs to site their compactor where it did. The only evidence in the record is that staff told the developer that a dumpster was required, Record on Appeal No. 10, Plaintiff's Exhibit 39. In any and all events, the CAB is not bound by the location suggested by staff, so long as the location ultimately approved complies with city ordinances.

18. p. 9, ¶ 3: The finding by the Court that the Plaintiffs were willing to implement any variation that council liked best is inconsistent with the Court's previous finding that the Plaintiff was willing to do what the council wanted. The evidence is, unequivocally, that the Plaintiffs presented the project to the council with slight variations, see City Exhibit A (Record on Appeal No. 11) and City Exhibit B (Record on Appeal No. 12), and essentially told the council to pick one, but no other. The Plaintiffs do not have the right to limit the considerations of council in this regard.

19. p. 9, ¶ 3: It is a factual misstatement and prejudicial to say that every opponent of the plans argued that the issue was one of stopping development in the area of Myrtle Beach. The record reflects numerous arguments being put forth by various members of the public with respect to this project, specifically relating to its location on the site, and its effect on neighboring properties, thus introducing into the record, contrary to the Court's factual finding, evidence of why this project did not comply with objective CAB criteria.

20. p. 10, ¶ 1, 2: The factual findings pertaining to statements made by councilmen at the hearing should be referenced in context. In any event, it is not what the council said that is relevant, but what it did. The council issued an Order citing specific criteria of the CAB ordinance in support of its decision. A council should not be bound by statements made during a hearing, any more than a judge should be. Rather, concentration should be had on the Order that is ultimately issued.

21. p. 11, ¶ 1 carried over from p. 10: The finding that council clearly showed that it had no intention of considering Plaintiffs plans is factually incorrect. Council specifically invited the submission of an alternate plan. See: September 3, 1998 Hearing: p. 113, l. 3-18; November 10, 1998 Hearing: p. 70, l. 17- p. 71, l. 7. Additionally, there is absolutely no evidence in the record to support the Court's factual finding that City Council made the issue before it into one of using the CAB process as a "sword to stop lawful development".

22. p. 11, ¶ 1: Contrary to the Court's finding, evidence was presented to rebut the Plaintiffs' exhibits. Reference need only be made to the comments of Bragg, Barnett, Furguson and Holst at the hearings with respect to the siting of this project.

Additionally, at the September 3 hearing, it was evident, from reference to the transcript, that exhibits were submitted and examined by the council. Indeed, the evidence is that the exhibits mounted on form boards was also presented to the Council in booklets and were orally described to the Council. As to the council listening to its staff with respect to compliance with city ordinances, the staff cannot bind the city council, when sitting as the CAB, as to CAB issues. Thus, staff statements with respect to other ordinances has no relevancy to the council or the court.

Contrary to the Court's finding, it is contested that there was evidence in the record to support the denial; otherwise, the City would not have defended this appeal.

23. p. 12, Section C: As with the initial appearance before the appointed CAB, the Defendant objects to any findings or conclusions with regard to a second appearance before the appointed CAB, for the reasons that neither the decision of appointed CAB or its members are not before the Court and are irrelevant to these proceedings.

24. p. 12, ¶ 1: The new series of drawings presented to the CAB on October 1, 1988 are the same drawings that have been considered by the council on September 3, 1998 and the Order should be amended to reflect this, as it is misleading not to do so.

25. p. 12, ¶ 2: Contrary to the Court's finding, the Plaintiff did not address the CAB questions regarding the dumpster. Instead, it said it would place the dumpster on site, as shown, or remove it altogether, if it could get approval to do so. Staff suggestion as to the siting of the dumpster is not binding on the CAB, as the Court's finding implies.

26. p. 12, ¶ 3: The so-called new drawings shown to the appointed CAB were the same drawings that the council

had previously rejected, and thus it is factually incorrect to characterize these drawings as an effort to address City Council's concerns regarding the wall of the garage.

27. p. 13, ¶ 1 carried over from p. 12: The Court finds, as fact, that exhibits 3 and 4 demonstrate that the plan would not be incompatible with the existing building on site. This is not a factual finding, but is a conclusion.

28. p. 13, ¶ 3 carrying over to p. 14: Contrary to the Court's factual finding, evidence was introduced to support the contention that the Plaintiffs' plan did not comply with CAB criteria. See October 1, 1998 Hearing: p. 64-66; 81-82; 90-92.

29. p. 15, ¶ 1: Council did give Plaintiffs 15 minutes to make their case, but the finding by the Court implies that this was an unusual limitation on the Plaintiffs. Reference to the CAB ordinance reveals that, in point of fact, the council gave the Plaintiffs 50% more time than the ordinance mandates. The Plaintiffs did not challenge the ordinance on this basis, and thus cannot be heard to complain about the length of time given, and thus cannot be heard complain about the length of time given, and the Court's finding in this regard is irrelevant. Additionally, contrary to the Court's factual finding, the record does not reflect that Council was solicited as to what would be required to have the project approved.

30. p. 15, ¶ 2: There is no factual basis for the finding that Council refused to review any of the Plaintiffs' 47 exhibits and should be struck from the Order. In fact, a review of the hearing transcripts clearly reveals that most of the exhibits were reviewed by the Plaintiff with the Council. Additionally, and ironically, most of the so-called new exhibits supposedly not reviewed by Council were either irrelevant or in opposition to the project, thus producing no prejudice to this Plaintiff.

31. p. 16, Footnote 56 is incorrect and prejudicial. The decision of the appointed CAB was not before the Court, as any appeal form it was to city council, per city ordinance. The Defendant was not required to defend what the appointed Board did not because it heard the matter *de novo*.

32. p. 17, ¶ 1 carried over from p. 16: Contrary to the Court's findings, there are far more references than two with respect to the relationship to the Plaintiffs' proposed building and other buildings. See, by way of example, testimony referenced in items 4, 22 and 28 of this motion.

33. p. 17, ¶ 2: Contrary to the Court's finding, the Defendant referenced the object criteria it relied on in determining that the Plaintiffs' building would not be compatible with the neighborhood. See: Orders of Council as to bulk of the structure, its orientation on site, the location of the dumpster and the effect of runoff on the swash, compared with Section 604.1.2, 604.1.4 and 604.1.7 of the ordinance.

34. p. 18, ¶ 1: Contrary to the Court's finding, the Defendant has given specific, objective evidence substantiating its finding that the plans were not compatible. See, by way of example, testimony referenced Items 4, 22 and 28 of this motion.

35. p. 19, ¶ 1 carried over from p. 18: Contrary to the Court's finding, the Plaintiff did not present four versions of the wall to the Defendant. See: City's Exhibits A and B, Record on Appeal No. 11 and 12. This finding is incorrect and should be struck.

36. p. 19, ¶ 2: Contrary to the Court's finding, the Plaintiff did not present four versions of the wall to the Council, and did not tell Council they would implement any plan selected by it; instead, Plaintiffs presented a version of the project to the Council, with slight

variations, and told the Council it had the limited option of picking one or the other.

Additionally, Footnote 60 is incorrect as Plaintiff's Exhibit 47 are mounted pictures that Council reviewed in booklet form and these pictures are nearly identical, if not identical, to the pictures and Council had reviewed at the September hearing.

37. p. 20, ¶ 1: Contrary to the Court's finding, four different versions of the wall were not presented to this Defendant. Contrary to the Court's finding, the Council did not indicate it would not approve any plans; in point of fact, it encouraged the Plaintiff to bring back an alternative plan. See testimony referenced in Item 21 of this Motion.

38. p. 20, Last paragraph: There is no evidence to support the inference that the Plaintiffs were singled-out and required to do more than other developers, as there is no evidence in the record whatsoever than this Plaintiff was similarly situated as other developers.

39. p. 21, Footnote 62: This footnote is factually incorrect as the Defendant defended this ground on appeal.

40. p. 21, ¶ 3: The Court implies that it is the responsibility of this Defendant to put forth evidence as to where the dumpster should have been placed. That responsibility, however, rests with the private sector, and not with the Defendant. The Plaintiffs proposed but one location throughout the proceedings.

41. p. 22, ¶ 1: Contrary to the Court's finding, the Defendant was not required to tell the Plaintiff where to put his dumpster on the lot and, further, was not required to find out what residents objected to and look for an alternative to satisfy those concerns. Respectfully,

these responsibilities rest with the private sector and not with the Defendant.

42. p. 22, ¶ 3: The Court misconstrues the Defendant's position with respect to the storm water management plan. Defendant does not maintain the plan did not comply with City storm water ordinances; rather, per the CAB ordinance, the Defendant was charged with giving special attention to this aspect of development, given its environmentally sensitive location. For reasons stated before, Council legitimately raised concerned with the quality of the water that would eventually reach the swash, and there is no evidence in the record addressing this issue.

43. p. 23, ¶ 1: There is no evidence in the record to support the Court's finding or inference that "a large group of people think very highly of this project" or that any such fact, if proven, has any bearing on whether the project is harmonious or sightly. It is the sole responsibility of the CAB to make this determination, and not what a poll may reveal. Additionally, contrary to the Court's finding, the City staff did not approve the building, and even if it did, their approval has no relevancy.

44. p. 24, ¶ 1: Contrary to the Court's finding, the opinion of the City staff has no binding effect on, or relevancy to, any decision rendered by the CAB, either the appointed board, or the City Council.

45. p. 24, ¶ 2: Contrary to the Court's finding, the Defendant did not argue that it could be arbitrary or subjective, if it relies on the proper ordinance. The Defendants, to the contrary, argue that the Peterson decision stands for the premise that specific standards must be employed when undertaking CAB review, that these standards were used in this case, and there was

evidence to support the conclusions drawn by the Council in applying those standards.

46. p. 24, Last ¶ carrying over to p. 25: It is error for the Court to "punish" the Defendant for receiving into evidence prejudicial exhibits which the Plaintiff introduced. Further, the discussion by the Court of these exhibits is inconsistent with its previous position that the Council did not review the exhibits introduced by the Plaintiffs, to their detriment.

47. p. 27, ¶ 1: Contrary to the Court's finding, the Peterson decision does not authorize the Court to apply the criteria of the CAB, or any other zoning ordinance.

48. p. 27, Last ¶ and continuing to p. 28: Contrary to the Court's finding, a reappearance before the CAB or Council would not be an exercise in futility, and the Court's finding in this regard is against the specific evidence in the record where the Plaintiff was invited to present an alternative proposal for consideration.

49. p. 29, ¶ 1: Contrary to the Court's inference, the Defendant did not argue that a high rise was not harmonious with other development on the Grand Strand, this area, or this block. To the contrary, the Council found that the high rise, as proposed, at this specific location, on this specific lot, was not compatible with the building on the lot, or those in the vicinity, consistent with the criteria of the CAB ordinance approved in the Peterson case.

50. p. 31, ¶ 2: Contrary to the Court's finding, the Plaintiffs did not say they would be whatever the Defendant wanted concerning the trash compactor or the wall; instead, they gave Council limited proposals, and told Council to pick which one it liked best.

51. The Court orders the Defendant to approve the plans submitted at the November, 1998 hearing. The Court's Order implies that there were a number of plans before the Council, but the Court does not specify which of those plans the Council is required to approve.

LAW

It is submitted that the Defendant adhered to the law of this state in rendering its decision in this case, to include the mandate of Peterson Outdoor Advertising v. City of Myrtle Beach, 489 S.E.2d, 630 (S.C. 1997). The Peterson decision admonished this Defendant, when serving as the CAB, to utilize the specific criteria of § 604 of the CAB ordinance. The Supreme Court was clear that the objectives of the ordinance set forth in § 601 could not be the sole standards of review. With respect to these standards, the Court said:

> ". . . these standards are extremely objective and lack definiteness. A decision based solely on these objectives is constitutionally in firm."

Id. At 633, 634.

The problem with the CAB decision in Peterson was that the standards utilized were subjective, as a matter of law. The Peterson court specifically sanctioned the specific criteria set forth in 604 of the ordinance. Here, the Council applied the criteria of § 604, and there is not a shred of evidence to the contrary.

The only issue before this Court is whether there is evidence in the record to support the decision of the Council. Respectfully, there was evidence to support their decision. By way of example, the Council clearly had a problem with the siting of the project. Given that the project is substantially larger than the building on site, that it is proposed to be situated on a very limited portion of the site, that it would dwarf the building on site and shadow the one next to it, these facts, alone, would justify or support a decision based on § 604 of the ordinance. Respectfully, the Court in rendering the decision it did overlooked cogent and unrefuted and objective evidence that was presented to the Council, and

upon which the Council was entitled to rely. This reason, in and of itself, entitles the Defendant to an amended judgment, or a new trial.

It is apparent that the Court disagrees with the decision of the Defendant. Even so, such does not justify this Court substituting its judgment for that of the Defendant, when there is evidence to support the Defendant's decision. This premise has been enunciated by courts of this state as early as 1952, Talbot v. Myrtle Beach Board of Adjustment, 72 S.E.2d 66 (S.C. 1952), and as recently as Peterson Outdoor Advertising v. Myrtle Beach, *supra*.

Finally, it was error for this Court to assume the role of the CAB and to apply the criteria of the ordinance to the application, as such is tantamount to this Court stepping out of the realm of judicial review, and undertaking a legislative or administrative function. The comment in the Peterson decision that it did not appear that the Court applied the objective criteria of the ordinance when ordering the issuance of the permits was obviously made in light of the circumstance that the Court had ordered the award of a permit, without the permit ever having been evaluated pursuant to § 604 of the ordinance. The Court specifically noted that the Council had not applied § 604, and until it had done so, it was in appropriate for a permit to be issued. Here, the Defendant applied § 604 of the ordinance. It evaluated the application pursuant to the standards sanctioned in Peterson. The only role of this Court is to ascertain whether there was evidence in the record to support that decision. For the Court to go beyond that role is tantamount to the Court undertaking a legislative function. Pages 27-32 of the Order, where the Court assumes the role of the CAB, is error as a matter of law and is highly prejudicial.

CONCLUSION

It is most respectfully submitted that this Court must amend its Order to find that there was evidence to support the decision of the Defendant, or alternatively, award the Defendant a new trial. This is so because when reading the Order in its entirety, it is evident that the Court either disregarded, misconstrued or misunderstood important facts of this case, which resulted in its misreading and misapplication of the law, all to the Defendants' prejudice.

RESPECTFULLY SUBMITTED,

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May 28, 1999

Charleston, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS
Boulevard Development and St. John's Inn, Plaintiffs/Appellants, vs. The City of Myrtle Beach, Defendant/Respondent.	)	CIVIL ACTION NOS. 98-CP-26-3516 98-CP-26-4311

[ENTERED: July 21, 1999]

ORDER DENYING RESPONDENT'S POST TRIAL MOTIONS AND APPELLANTS' MOTION FOR ATTORNEY'S FEES

This matter was before the Court pursuant to: 1) Respondent's Motion to Alter or Amend the Judgment, or in the alternative for a new trial; and 2) Appellants' Motion for Attorney's Fees. These motions were heard on July 9, 1999. Present were: Howell v. Bellamy, Jr. and Douglas M. Zayicek for Appellants, and Frances Cantwell for Respondents. After carefully reviewing Respondent's Motion and allowing both sides to be heard on each issue, the Court denies Respondent's post trial Motions except for alleged point of error number 8. Thus, the Court's Order is reaffirmed in full, except that footnote 10, on page 5 of the Order, is hereby deleted.

The Court also heard Appellants' Motion for Attorney's Fees pursuant to S.C. Code Ann § 15-77-300, and *Simpkins v. City of Gaffney*, 315 S.C. 26, 431 S.E.2d 592 (S.C. App. 1993). The Court denies this Motion.

IT IS SO ORDERED!

/s/ J. Stanton Cross, Jr.
Hon. J. Stanton Cross, Jr.
Master-In-Equity

Conway, South Carolina
July 20, 1999.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

FLORENCE DIVISION

Sunrise Corporation of Myrtle Beach Boulevard Development, L. L. C., and S&H Development, Inc.,	CASE NO. 4:99-132-12
Plaintiffs,	
vs.	
The City of Myrtle Beach, and Mark McBride, Judy Rodman, Rachael Broadhurst, Charles Martino, Wilson Cain, and Crain Woods, Individually,	MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT
Defendants.	

STANDARD OF REVIEW

Summary Judgment is warranted if, from the totality of the evidence presented, including pleadings, discovery and affidavits, the court is satisfied there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. A party faced with a summary judgment motion must present evidence sufficient such that a reasonable juror could find, by a preponderance of the evidence, in his favor. Sylvia Development Corporation v. Calvert County, Maryland, 48 F.3d 810 (4th Cir. 1995).

Entry of summary judgment is mandated, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and upon which that party will have the burden of proof

at trial, because a failure of proof of an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Celotex Corporation v. Catrett, 477 U.S. 317 (1986).

* * *

After all, S&H Development did sell the property, after the denials of the Council, for $4 million, a sum in excess of what it paid for the property. Scott v. Greenville County, *supra*.

Summary judgment is warranted as to the federal takings causes of action for the further reason that there is no federal cause of action for a taking, whether by inverse condemnation or positive act, if there is a state remedy available. Williamson Planning Commission v. Hamilton Bank, *supra*. The First English and Lucas decisions mandate state remedies be provided for regulatory takings. South Carolina is in compliance with this mandate. Its laws recognize a cause of action for inverse condemnation. Moore v. Sumter County Council, 300 S.C. 270, 387 S.E.2d 455 (1990). Absent this court's dismissal of the takings claims based on state law, which is warranted, this court should require the Plaintiffs to pursue their takings claims under state law.

V. ANY CAUSE OF ACTION OF BOULEVARD DEVELOPMENT BASED ON A VIOLATION OF DUE PROCESS OR EQUAL PROTECTION MUST BE DISMISSED.

Pending in the state courts of South Carolina is an action between the Defendant City of Myrtle Beach and Boulevard Development, LLC. That cause of action alleges an abuse of discretion on behalf of the City in denying CAB approval, and specifically alleges a violation of due process and equal protection. Ex. 11 and 14. As these issues have been adjudicated in the lower state

court, and are currently pending there on appeal, the doctrine of res judicata precludes this Plaintiff from relitigating the same issues in this forum. Admittedly, the petitions filed in the state court by this Plaintiff did not specify if state and federal relief were sought, and neither did the order of the lower court. The responsibility for preserving issues rests with the moving party, the Plaintiff. In any event, it is evident that these issues were decided at least under state law, thus precluding their being retried on that basis in this forum.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

SUNRISE CORPORATION OF MYRTLE BEACH, BOULEVARD DEVELOPMENT, L.L.C., AND S&H DEVELOPMENT, INC.,	)	CIVIL ACTION NO.
PLAINTIFFS,	)	
VS.	)	
THE CITY OF MYRTLE BEACH, AND MARK MCBRIDE, JUDY RODMAN, RACHAEL BROADHURST, CHARLES MARTINO, WILSON CAIN, AND CRAIN WOOD, INDIVIDUALLY,	)	ANSWER OF DEFENDANTS
DEFENDANTS.	)	

[ENTERED: January 14, 1999]

The Defendants, in answer to the Complaint, allege and say:

FOR A FIRST DEFENSE

1. Each and every allegation of the Complaint not herein specifically admitted, modified or explained is denied, and strict proof thereof is demanded.

2. The Defendants are without sufficient information to be able to form an opinion or belief as to the allegations of Paragraph 1 of the Complaint, and therefore demands strict proof thereof.

3. Paragraphs 2 and 3 of the Complaint are admitted.

* * *

Defendants sued in their individual capacity for failure to state a claim against these Defendants.

FOR AN EIGHTH DEFENSE

43. In further answer to the Complaint and as an Eighth Defense to it, some or all of the Plaintiffs lack standing to prosecute the claims alleged, and as to those Plaintiffs, the Complaint must be dismissed.

FOR A NINTH DEFENSE

44. In further answer to the Complaint, and as a Ninth Defense to it, the Complaint of Plaintiff Boulevard Development, LLC should be dismissed as to some or all of the Defendants because the same claim is pending in another action.

FOR A TENTH DEFENSE

45. In further answer to the Complaint, and as a Tenth Defense to it, any and all state causes of action alleged are barred as to the individual Defendants pursuant to S.C. Code, Sec. 15-78-70 (Supp. 1997).

FOR A ELEVENTH DEFENSE

46. In further answer to the Complaint, and as an Eleventh Defense to it, any and all state causes of action against the Defendants are barred pursuant to S.C. Code Sec. 15-78-60(1), (2), (4), (5) and (12) (Supp. 1997).

* * *

FILED
FEB 24 2006
OFFICE OF THE CLERK

No. 05-802

In The Supreme Court of the United States

SUNRISE CORPORATION OF MYRTLE BEACH, BOULEVARD DEVELOPMENT, L.L.C., and S&H DEVELOPMENT, INC.,

Petitioners,

v.

THE CITY OF MYRTLE BEACH; MARK McBRIDE; JUDY RODMAN; RACHEL BROADHURST; CHARLES MARTINO; WILSON CAIN; CRAIN WOODS; LARRY BRAGG; TOM CONN; TOM DAVIS; SALLY HOWARD; FRED ROURK, INDIVIDUALLY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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PARTIES TO PROCEEDINGS

All partied to this proceeding are set forth in the caption.

CORPORATE DISCLOSURE STATEMENT WITH RESPECT TO RESPONDENTS

No Respondent is a corporate entity.

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INTRODUCTION

This case involves nothing more than an errant application of state law that resulted in a delay in the issuance of a building permit. Such has never been recognized by this Court as giving rise to a constitutional violation. *See Agins v. City of Tiburon*, 447 U.S. 255, 263 n. 9 (1980) (overruled on other grounds); *First English Evangelical Lutheran Church v. City of Los Angeles*, 482 U.S. 304, 320 (1987).

The Petitioners argue that the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") erred in affirming the United States District Court of South Carolina, Florence Division's ("District Court") grant of summary judgment in favor of Respondents on Petitioners' claims based on due process, equal protection and *res judicata*. With regard to the latter two claims, Petitioners essentially question the Fourth Circuit's analysis of the evidence in the case. The Fourth Circuit upheld the District Court's ruling on Plaintiff's *res judicata* claim, finding that the matters in question were not litigated in the state courts. (4th Cir. Op., Pet. App. at 7-8.) The Fourth Circuit also concluded that Petitioners' equal protection claim should fail because there was insufficient evidence to prove purposeful discrimination or to show that Petitioners were treated differently from others similarly situated. (4th Cir. Op., Pet. App. at 9-11.) The record supports the Fourth Circuit's findings, and questioning such rulings is not an exercise worthy of this Court's attention.

Petitioners' due process claims should fair no better. The Fourth Circuit, consistent with this Court, found that the state provided multiple levels of review and that the design board's violation of state law did not rise to the level of a federally protected right. (4th Cir. Op., Pet. App. at 9.) Although the Fourth Circuit did not apply the "entitlement test" announced by this Court in *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 566 (1972), the Petitioners argue that this Court should grant the petition to resolve an "enduring split" among the circuits as to whether to apply the entitlement test in land use cases. Since the Fourth Circuit did not apply the test, this is certainly not the case that should be used to evaluate it. Furthermore, although the circuit courts admittedly do not all peer through the same spectacles, their focus on preventing federal courts from being forums for questioning local zoning decisions based on state law is the same. Accordingly, unless this Court desires the federal courts to become more involved in such local zoning decisions, there is no need for the Court to grant the petition.

STATEMENT OF THE CASE

Petitioners are South Carolina corporations formed in the mid-1990's for the purpose of purchasing (S&H Development Corporation of Myrtle Beach, LLC), operating (Sunrise Corporation) and further developing (Boulevard Development, LLC) a 2.5 acre site in the City of Myrtle Beach, South Carolina, upon which a hotel and restaurant were located. (D. Ct. Order, Pet. App. at 14-15.) After considering various development schemes,

Petitioners determined to construct a 14-story tower comprised of five levels of parking and 98 condominium units. (4th Cir. Op., Pet. App. at 3.)

The City of Myrtle Beach zoning code required Petitioners' project to be reviewed and approved by a community appearance board ("CAB") before being eligible for a building permit, with the right of appeal to the city council. (*Id.*, Pet. App. at 3-4.) On appeal to the city council, the application was considered *de novo*. A person aggrieved by the decision of the city council could then appeal to the South Carolina circuit court. (*Id.*) (citing Community Appearance Board Ordinance, Sections 603.1,606,607, Pet. App. at 215, 223-226.)

When the project was unveiled to the public, there was considerable and varied opposition, with objections ranging from design considerations to environmental concerns to traffic and general development opposition. (Excerpts, Council Hrgs., Resp. App. at 69a –82a.)

In August 1998, the CAB turned the project down. Petitioners took an appeal to the city council which, after conducting a hearing on September 3, 1998, issued a written order on September 8, 1998 denying approval. (Order of Council, Resp. App. at 1a – 5a.) The order raised issues regarding the location of the tower in relation to the other structures on site and in the vicinity, the unrelieved bulk of the tower, the exterior treatment to a wall and the location of dumpster facilities. (*Id.*) Petitioners appealed to the state circuit court.

Petitioners resubmitted an application to the CAB. This application was essentially identical to that previously rejected by the council. (Excerpts, Bragg dep., Resp. App. at 83a – 87a.) The CAB again turned the project down. A second appeal was taken to city council. City council held a second *de novo* hearing on November 10, 1998, and issued its written order on November 25, 1998 denying approval for the reasons previously given. (Order of Council, Resp. App. at 6a-8a) A second appeal was taken to the state circuit court.

The state circuit court appeals were consolidated for trial, and while they were pending, Petitioners instituted this action in state court seeking damages for violations of constitutional rights from the city and members of the CAB and city council who had voted against their project. The case was removed to the District Court and, by agreement, was stayed pending the outcome of the state zoning appeals litigation.

In May 1999, the state circuit court issued an order reversing the decisions of the council. Respondents appealed. In February 2001, the South Carolina Court of Appeals affirmed the decision of the circuit court. After issuing its writ of certiorari to the Court of Appeals, and after the matter had been briefed and argued, the South Carolina Supreme Court withdrew its writ as improvidently granted. At that point, a building permit was made available, and the stay of these proceedings was lifted.

Thereafter, all parties moved for summary judgment. By oral order issued on September 4, 2003 and written order entered on August 10, 2004, the District Court awarded Respondents summary judgment. In an opinion entered on August 26, 2005, the Fourth Circuit affirmed the decision of the District Court. Petitioners now seek a writ from this Court to review the decision of the Fourth Circuit so as to give them an opportunity to pursue damages for the delay they incurred in securing a building permit.

REASONS FOR DENYING THE WRIT

1. THE ANALYSIS OF THE FOURTH CIRCUIT IS CONSISTENT WITH ITS PRECEDENT, THAT OF THIS COURT AND OF OTHER CIRCUITS

The Fourth Circuit properly analyzed the due process claims. As to procedural due process, the Fourth Circuit reviewed the entire process accorded by state law, to include available levels of judicial review. It noted that a due process claim is not complete unless and until the state fails to provide process, and that the various levels of review available to (and successfully used by) Petitioners was "an indication of the existence of procedural due process, rather than its absence." (4th Cir. Op., Pet. App. at 9.) This analysis wholly comports with Fourth Circuit precedent, *see Tri-County Paving Inc. v. Ashe County*, 281 F.3d 430, 437 (2002), and that of this Court, *see Hudson v. Palmer*, 468 U.S. 517, 533 (1984).

As to substantive due process, contrary to Petitioners' contention, conduct was addressed. The Fourth Circuit ruled that the state court determination of arbitrariness did not equate to a federal constitutional violation. (4th Cir. Op., Pet. App. at 9.) This finding wholly comports with Fourth Circuit precedent, *see Sylvia Dev.Corp.v. Calvert County*, 48 F.3d 810, 825 (4th Cir. 1995), that of other circuits, *see, e.g., SFW Arecibo, Ltd. v. Rodriguez*, 415 F.3d 135, 141 (1st Cir. 2005); *Yale Auto Parts v. Johnson*, 758 F.2d 54, 58-60 (2d Cir. 1985); *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 401-02 (3d Cir. 2003); *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994) ("a person contending that state or local regulation of the use of land has gone overboard must repair to state court"), and this Court, *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 848 (1998) ("[W]e have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm.").

Having found that the conduct did not rise to the level of a constitutional violation, the Fourth

Circuit did not apply the entitlement test[1] to affirm the District Court's decision. However, it could have easily done so, because the ordinance in question gave the design board considerable discretion in evaluating applications. *See* (D. Ct. Order, Pet. App. at 22-25); *see also* (Resp. Br. to 4th Cir., Resp. App. at 9a-54a.)

Property interests protected by substantive due process are those recognized as fundamental, rooted in history and tradition. *See Washington v.*

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[1] The Fourth Circuit holds that, absent an entitlement to a permit, there is no protected property interest for purposes of federal due process, either procedural or substantive. *See Sylvia,* 48 F.3d at 826. This is the majority approach, *see Macone v. Town of Wakefield,* 277 F.3d 1, 9-10 (1st Cir. 2001); *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 914-18 (2d Cir. 1989); *Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068, 1070-71 (8th Cir. 1997); *Norton v. Village of Corrales*, 103 F.3d 928, 931-33 (10th Cir. 1996); *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 201-04 (6th Cir. 1995); *MacKenzie v. City of Rockledge*, 920 F.2d 1554, 1558-59 (11th Cir. 1991), and it has proved useful in preventing the federal courts from becoming super zoning boards for municipal decisions. Two circuit courts do not apply the entitlement test. *See DeBlasio v. Zoning Bd. of Adjustment for the Township of West Omwell*, 53 F.3d 592, 598-601 (3d Cir. 1995); *River Park, Inc.*, 23 F.3d at 165-67. However, each has suggested that the proper place for run-of-the-mill zoning disputes, like the one at issue, is the state courts. *See United Artists*, 316 F.3d at 402 (adopting a "shocks the conscious" test and stating that such test should prevent the federal courts from "being cast in the role of a "'zoning board of appeals.'"); *River Park, Inc.*, 23 F.3d at 167 ("the idea in zoning cases is that the due process clause permits municipalities to use political methods to decide, so that the only procedural rules at stake are those local law provides, and these rules must be vindicated in local courts").

Glucksberg, 521 U.S. 702, 720-21 (1997). It has been noted that freedom from delay in receiving a regulatory permit hardly fits this bill. *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 200 (2003) (Scalia, J., concurring).

This Court has been clear that only the most egregious, abusive executive action, that which shocks the conscience, is arbitrary in the constitutional sense. *See County of Sacramento,* 523 U.S. at 846. This case involves no such conduct.

Petitioners contend the state trial judge's characterization of the council's conduct is competent evidence on the issue of abusive executive action. (4th Cir. Op., Resp. App. at 9); (Pet. Br. to 4th Cir., Pet. App. at 149.) This contention is untenable. The state trial judge relied solely on state zoning precedent, where sufficiency of evidence is the standard of review. (Op. S.C. Ct. App. Pet. App. at 41, discussing the standard of review.) The final order in the state proceedings, that of the appellate court, *see* discussion *infra* Part 2, held the decisions of the council were arbitrary, not because they were irrational, but because they lacked evidentiary support. This is hardly conscious shocking conduct. *See County of Sacramento,* 523 U.S. at 846. And, given the nature of zoning, reacting to public input is predictable, if not to be expected. *See Sylvia Dev. Corp.*, 48 F.3d at 828, 829 ("Indeed it is the very essence of elected zoning officials' responsibility to mediate between developers, residents, commercial interests, and those who oppose and support growth and development in the community . . . . It is not

pernicious per se for a zoning authority to be influenced by political pressure in the community").

Casting the nature of conduct required to sustain a substantive due process claim as including erroneous applications of land use laws will make every routine zoning decision a case of constitutional import. This premise has been rejected in equal protection analyses. *Snowden v. Hughes*, 321 U.S. 1, 11-12 (1944). Substantive due process should be no different.

Petitioners lacked the requisite protected property interest to support a substantive due process claim in the first instance, and produced no competent evidence of arbitrary conduct in the constitutional sense in the second.

As for remedies, state law accommodated what was sought, a building permit.[2]

2. THE FOURTH CIRCUIT CORRECTLY ANALYZED THE STATE PRECLUSION CLAIMS

Federal courts must apply state preclusion rules to determine if a prior state court judgment

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[2] Petitioners' reference to S.C. Code § 16-5-60 (2005) for the proposition that the zoning remedy is inadequate because a county (but not a municipality) may be sued for damages of obstructing the exercise of constitutional rights widely misses the mark. To the extent this issue is appropriate for review, as it was not raised in prior proceedings, the statute has no efficacy here. The statute is intended to protect against intimidation for the exercise of civil rights. Petitioners were not obstructed in the exercise of any right.

has either issue or claim preclusion effect in a § 1983 action. 28 U.S.C. § 1738. For *res judicata* to apply, South Carolina law requires an identity of parties, identity of subject matter and adjudication of the claim in the former suit. *Plum Creek Dev. Co. v. City of Conway*, 512 S.E.2d 106, 109 (S.C. 1997). Both the Fourth Circuit and District Court concluded that the state court judgment had no preclusive effect. (4th Cir. Op., Pet. App. at 7-8); (D. Ct. Order, Pet. App. at 177-180.) This Court should adhere to its practice of not reviewing a construction of state law that has been agreed upon by two lower federal courts. *See Stenberg v. Carhart*, 530 U.S. 914, 939 (2000).

With regard to whether the claim has been previously adjudicated, Petitioners rely on a single line in the state trial court order. (Pet. at 25); (St. Tr. Ct. Order, Pet. App. at 46-47.) This contention is ludicrous, when the record of the state proceedings and the positions advanced there by Petitioners reveal the state proceedings were limited to whether a zoning law had been correctly applied under state zoning precedent.[3] *See* (Excerpts, Tran. St. Tr. Ct. Hrg., Resp. App. at 63a-68a); (Pet. Br., S.C. Ct. App., Resp. App. at 55a-62a); *see also* (Op. S.C. Ct. App., Pet. App. at 41, discussing standard of review.)

---

[3] The federal claims could not have been litigated in the state courts. The state proceedings were limited to the record; therefore, there was no ability to supplement the record, offer testimony or pursue discovery. South Carolina courts do not apply *res judicata* in instances where claims could not be asserted, even if they arise from common facts of prior litigation. *See P.J. Constr. Co., Inc. v. Roller*, 340 S.E.2d 564, 565-66 (S.C. Ct. App. 1986).

Furthermore, the state court judgment to which preclusion rules applies is that of the South Carolina Court of Appeals, not the state trial court. *See Barth v. Barth*, 360 S.E.2d 309, 310 (S.C. 1987) ("ordinarily, the disposition of a case in the Court of Appeals when certiorari is not...granted becomes the law of the case"). That court limited its review to state zoning precedent. (Op. S.C. Ct. App., Pet. App. at 41.)

In considering the issue, the Fourth Circuit stated that the South Carolina Court of Appeals order was "nothing other than a Court review of an administrative determination by local zoning authority" wherein the federal Constitutional rights of due process and equal protection were not adjudicated. (4th Cir. Op., Pet. App. at 7). This assessment was correct in light of the holding of the state court of appeals:

> These five stated issues essentially present two arguments. First, did the trial court err in reversing City council's decision because there was evidence in the record to support the decision? Second, did the trial court err is substituting its judgment for that of the City Council?
>
> . . . .
>
> We conclude the decision of the City Council was arbitrary because it was based, not on the evidence in the record and the aesthetic concerns of the CAB

> ordinance, but upon the objections of citizens of the neighborhood who wanted to stop further development in the area.

(Op. S.C. Ct. App., Pet. App. at 42, 45.)

The District Court also considered whether the issues were actually litigated in state court. At the hearing on Petitioners' motion for summary judgment the following colloquy occurred between the District Court and counsel for Petitioners:

> The Court: In your brief to the Supreme Court of South Carolina and to the Court of Appeals....did you argue that the conduct of the Defendant's violated due process law?
>
> Mr. Zayicek: Well, they brought up the fact that
>
> The Court: You either did or you didn't. My question is did you argue that in your brief?
>
> Mr. Zayicek: It was argued before the Court of Appeals.
>
> The Court: What cases did you sight?
>
> Mr. Zayicek: We did not sight any cases.

> The Court: I didn't ask what they did I asked what you did.
>
> Mr. Zayicek: We did not.
>
> The Court: You did not sight any federal law?
>
> Mr. Zayicek: No sir.
>
> The Court: To support there was a federal violation?

(D. Ct. Hearing, Pet. App. at 178-79).

Petitioners' *res judicata* claim also fails because there is no identity of the subject matter. The state proceeding was an administrative appeal, limited to the record, where the standard of review was whether the decision had evidentiary support. *See Peterson Outdoor Adver. v. City of Myrtle Beach*, 489 S.E.2d 630, 632 (S.C. 1997). This § 1983 action turns on whether, under color of state law, a policy was applied to these Petitioners that deprived them of constitutional rights, and as to the individual Respondents, whether such was done in disregard of known constitutional rights. *See Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690-94 (1978); *Elder v. Holloway*, 510 U.S. 510, 512 (1994). If there is any question as to identity of subject matter, South Carolina law inquires if the same proof would support each case. *Griggs v. Griggs*, 51 S.E.2d 622, 626 (S.C. 1949). As the proof required to sustain the state litigation differs substantially from the proof required here, there is no identity of subject matter.

Finally, Petitioners' claim should fail because there is no identity of parties. The individual Respondents were not parties to the state litigation. (Pet. Br., S.C. Ct. App., Resp. App. at 55a.)

3. THE FOURTH CIRCUIT CORRECTLY DISPOSED OF THE EQUAL PROTECTION CLAIM

Equal protection is not implicated by merely showing disparate treatment among those similarly situated. Equal protection requires a showing of intentional, purposeful discrimination, a motive that is not presumed. *Snowden*, 321 U.S. at 8.

The basis of Petitioners' equal protection claim has been a moving target throughout this litigation. Their complaint alleged a violation of equal protection because of the location of their project on the second row back from the front beach. (Amended Complaint, Pet. App. at 171-72.) At summary judgment and on appeal, Petitioners argued they were denied equal protection because other high rises had been approved, but not theirs. (Pet. Br. 4th Cir., Pet. App. at 150-55.) The Fourth Circuit correctly noted that the orders denying approval were not based on either of these grounds. (4th Cir. Op., Pet. App. at 10.) Even if they had

been, Petitioners were required to proffer evidence of willful, purposeful discrimination.[4]

Petitioners resort to the trial court order as evidence of malice. The final order in the state litigation, that of the Court of Appeals, *see Barth*, 360 S.E.2d at 310, simply held that the acts of Respondents were arbitrary because they were without evidentiary support. (Op. S.C. Ct. App., Pet. App. at 45.) That court did not address, much less hold, that the acts were intentional or the result of bias, animus, or ill will. As such motives are not presumed, *see Snowden*, 321 U.S. at 8, Petitioners were required to proffer competent evidence that the acts of Respondents were motivated by purposeful, intentional discrimination. This they did not do. Viewing the record in the light most favorable to Petitioners reveals that projects similar to theirs were approved. However, theirs was not approved due to Respondents reacting to public sentiment and not applying the criteria of the design review ordinance. Such is hardly the degree of conduct that supports an equal protection violation.

Petitioners contend that misdirected applications of state law implicate equal protection claims. Such a construction of the clause "which would find a violation of federal right in every

---

[4] *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) was before the court on a Rule 12(b)(6) motion, where the sufficiency of pleadings is the test. These Petitioners were before the court on a motion for summary judgment, and unlike the Olechs, were required to proffer competent evidence on every element of their claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

departure by state officers from state law is not to be favored", *id.* at 11-12, and will lead to "transforming run-of-the-mill zoning cases into cases of constitutional right." *Village of Willowbrook v.Olech*, 528 U.S. 562, 566 (2000) (Breyer, J., concurring in the result). Such is a slippery slope upon which this Court need not embark.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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STATE OF SOUTH CAROLINA

BEFORE THE CITY COUNCIL OF THE CITY OF MYRTLE BEACH

COUNTY OF HORRY

IN RE:

ST. JOHN'S INN - APPEAL FROM THE COMMUNITY APPEARANCE BOARD

ORDER

[ENTERED: September 8, 1998]

This matter is before City Council pursuant to Section 605 of the Zoning Ordinance of the City of Myrtle Beach. The Applicant, St. John's Inn, appeals to Council from a decision of the Community Appearance Board (CAB) rendered on August 20. 1998 in which the CAB denied the application to construct a high-rise condominium project on its property at 6803 North Ocean Boulevard in the City of Myrtle Beach which would be in addition to an existing three or four story structure known as the St. John's Inn. A hearing *de novo* was held before City Council on September 3, 1998. Members of Council present and participating were:

Mayor Mark Struthers McBride
Councilwoman Judy Rodman
Councilman Charles W. Martino, Jr.
Councilman Wilson Cain
Councilman Crain Woods

Councilman W. Wayne Gray was present at the meeting but recused himself from the hearing on this matter because of a conflict of interest.

The applicant was represented at the hearing by Douglas M. Zayicek, Esquire, and by Thomas Pegram, the architect for the project. Rusty Helms also spoke on behalf of the applicant. The following spoke in opposition to the project: Michael Barnett, Esquire, representing the Property Owners Association from Seamark Towers, a neighboring high rise condominium structure; Arthur Reimer; Jean F. Ferguson; Grace Bosworth; Lorraine M. Hoist; Davis A. Hoist; and Maureen McGinty-Altman.

In this *de novo* hearing, City Council is free to accept new evidence and view the facts without regard to the determinations made by the CAB. Council must review the facts developed during the hearing and apply the criteria provided in section 604 of the Zoning Ordinance with particular consideration to the objectives set forth in section 601.

The CAB was created for the purpose, among others, of reviewing site developments so as to discourage unsightly or inharmonious development in the City. CAB review and approval is in addition to other requirements for development in the City. The CAB, and this Council in its capacity as the hearing board of review of CAB decisions, is charged with assuring that proposed developments do not detract from the design of surrounding properties and that they relate harmoniously to the

environment of the vicinity in which they are to be constructed.

The applicant in this case argues that its project satisfies all of the requirements of the zoning and building codes of the City. It further suggests that it will make minor adjustments as necessary to make the project satisfy CAB or Council objections. The opponents argue that a project of the size and density of the proposed project is not in harmony with the surrounding neighborhood, will result in unacceptable traffic congestion that will create serious traffic safety problems, will potentially cause environmental problems in the swash which runs adjacent to the project site because of stormwater runoff, and will negatively affect the views of its neighbors.

After reviewing all the information provided at the hearing. City Council makes the following findings of fact:

1. The proposed project is a fourteen-story building that would contain 98 individual residential units. The bottom five stories would be a parking garage.

2. The project as proposed meets all requirements of the Zoning Ordinance except approval by the CAB.

3. The unrelieved bulk of the proposed structure and its orientation on the lot are not compatible with the existing

buildings in the neighborhood or with the existing building on site.

4. The solid wall on the parking garage is required by the City Zoning Ordinance, but is lacking in architectural features to break the unrelieved visual effect.

5. The proposed location of the solid waste compactor will have an unacceptable visual impact on neighboring properties.

6. The available evidence did not adequately address the possible effects of storm water design on ground water or on the adjacent swash.

When these findings are examined in relation to the criteria in Section 604, Council concludes that the proposed development fails to meet the objectives in Section 601.2 (b) and (c) which are to "[d]iscourage monotonous, drab, unsightly, dreary and inharmonious developments"; and to "[c]onserve the city's natural beauty and visual character and charm by insuring that structures...are properly related to their sites, and to surrounding sites and structures...and that proper attention is given to the exterior appearance of structures...." In particular Council has applied the criteria in Sections 604.1.2, 604.1.4, and 604.1.7 to reach this conclusion (See exhibit A for Article VI of Zoning Ordinance). In reaching this conclusion. Council is conscious of the fact that the applicant may reapply for a permit at any time to build a revised project that addresses the

concerns raised herein. Such application would receive the same review as any other submission. including review by the CAB.

For the above reasons City Counsel disapproves the application 01 St. John's Inn

AND IT IS SO ORDERED.

/s/
MARK STRUTHERS McBRIDE
MAYOR

ATTEST:

/s/
JOAN GROVE,
CITY CLERK

DATED: Sept. 8, 1998

City of Myrtle Beach
SOUTH CAROLINA

[ENTERED: November 30, 1998]

November 25, 1998

Douglas M Zayicek, Esq.
Bellamy, Rutenberg, Copeland, Epps,
Gravely &. Bowers, P.A.
P.O. Box 357
Myrtle Beach, SC 29578

Dear Mr. Zayicek:

Re: St. John's Inn
Appeal from the decision of the Community Appearance Board
Your File: 13084-34600

Please accept this letter as written notice of the decision of City Council in the matter of the appeal from the October 1, 1998 decision of the Myrtle Beach Community Appearance Board. On that data the Board denied the application of your clients, Boulevard Development and St. John's Inn for a permit to construct a high-rise structure at 6803 North Ocean Boulevard.

Pursuant to the provisions of City Zoning Ordinance Section 606, City Council heard the appeal of your clients on November 10, 1998. After considering the material presented by the various parties in interest. City Council voted to uphold the decision of the Community Appearance Board and to

deny your clients' application far a permit to construct the proposed structure. The following findings were stated in the motion to deny the application:

1. The proposed project is a fourteen-story building that would contain 96 individual residential units. The bottom five stories would be a parking garage.

2. The project as proposed meets all requirements of the Zoning Ordinance except approval by the CAB.

3. The unrelieved bulk of the proposed structure and its orientation on the lot are not compatible with the existing buildings in the neighborhood or with the existing building on site.

4. The solid wall on the parking garage is required by the City Zoning Ordinance, but is lacking in architectural features to break the unrelieved visual effect.

5. The propose location of the solid waste compactor will have an unacceptable visual impact on neighboring properties.

6. The available evidence did not adequately address the possible effects of stormwater design on ground water or on adjacent swash.

As I believe you are aware, Section 607 of the Zoning Ordinance provides that any appeal from the decision of City Council is to the Circuit Court in and for Horry County.

Yours very truly,

/s/
Joan Grove
City Clerk

cc: (all interested parties)

RECORD NO. 04-2171

In The
United States Court of Appeals
For The Fourth Circuit

SUNRISE CORPORATION OF MYRTLE BEACH;
BOULEVARD DEVELOPMENT LLC;
S&H DEVELOPMENT INC.,
Plaintiffs – Appellants,

v.

THE CITY OF MYRTLE BEACH; MARK McBRIDE; JUDY RODMAN; RACHAEL BROADHURST; CHARLES MARTINO; WILSON CAIN; CRAIN WOODS; LARRY BRAGG; TOM CONN; TOM DAVIS; SALLY HOWARD; FRED ROURK, Individually,
Defendants – Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AT FLORENCE

BRIEF OF APPELLEES

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William B. Regan
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JURISDICTIONAL STATEMENT

Appellees adopt the Jurisdictional Statement set forth in Appellants' Brief.

STATEMENT OF ISSUES

1. Do State of South Carolina preclusion rules prevent Appellees from contesting liability for alleged violations of the due process, Equal Protection and Fifth Amendment clauses of the United States Constitution?

2. Does a party have standing to sue for damages based upon an erroneous denial of a permit to a third party?

3. Was the District Court correct to dismiss the Due Process claims in light of the discretion embodied in the CAB ordinance and the availability of a remedy provided by the ordinance and state law to correct errors made during that process?

4. Was the District Court correct to dismiss the equal protection claim in light of the legitimate state interest being pursued by Appellees and the lack of evidence to support any intentional, invidious discrimination?

5. Was the District Court correct to dismiss the takings and inverse condemnation claims where there was no physical appropriation of property, Appellees had use of their property throughout the state proceedings, the property was sold at a substantial profit, and the delay in securing the contested permit was related solely to the time required to obtain judicial review?

STATEMENT OF THE CASE

This action was commenced on December 17, 1998 in the state courts of South Carolina to recover damages allegedly resulting from of Appellees' refusal to grant design approval to one of the Appellants' construction projects. The causes of action asserted by Appellants included violations of state and federal due process and equal protection; a fifth amendment taking; inverse condemnation; and arbitrary decision making. Attorneys fees and costs were sought under 42 U.S.C. § 1988.

Appellees removed the case to the Florence Division of the United States District Court for the District of South Carolina. Pending in state court at

that time were two administrative appeals from decisions of the City Council of Myrtle Beach denying design review approval. This matter was stayed pending the outcome of those appeals. (Docket Entry 1, Minute Entry; J.A. pp. 5, 6.)

In May 1999, the state trial court issued an order reversing the decisions of the City. The City appealed, and in February 2001, the South Carolina Court of Appeals issued an opinion affirming the result reached by the trial court. The Court of Appeals held the decisions rendered by the City were without evidentiary support and that a remand would be futile. A petition for a writ of certiorari was granted by the South Carolina Supreme Court, but thereafter dismissed as improvidently granted in December 2002. (J.A. pp. 216-227.)

The stay of this case was lifted in May 2003, and a hearing was held on the parties' cross motions for summary judgment on September 4, 2003. At the conclusion of the hearing, the Honorable C. Weston Houck issued an oral order: (1) denying Appellants' motion for summary judgment on the issue of whether state preclusion rules prevented the City from contesting liability; (2) granting Appellees' motion for summary judgment on Appellants' federal due process and equal protection claims; (3) dismissing the federal takings claim as unripe; and (4) reserving all other issues. (District Court Order; J.A. p. 666-667.)

Appellants' Motion to Reconsider was heard in October 2003. Judge Houck permitted additional briefing, and on August 9, 2004, issued a written

order: (1) dismissing two plaintiffs for lack of standing; (2) denying Appellants' motion to reconsider; and (3) granting Appellees' motion for summary judgment on the takings and inverse condemnation claims. (District Court Order; J.A. pp. 663-679.)

On September 8, 2004, Appellants filed a notice of appeal of the orders of September 4, 2003, and August 9, 2004. (J.A. p. 680.)

STATEMENT OF FACTS

Article VI of the zoning ordinance of the City of Myrtle Beach provides for a Community Appearance Board ("CAB"). At all times pertinent to this action, the CAB ordinance required a board appointed by the City Council to approve the design, siting and exterior of certain construction in the City. No building permit could be issued absent CAB approval of the proposed construction.

The CAB ordinance specified criteria by which projects were to be evaluated and permitted an applicant aggrieved by a decision of the CAB to appeal to City Council. In such instances, the Council sat as the CAB and considered the application *de novo*. The ordinance further provided for an appeal from the Council to the state circuit court. (CAB Ordinance, §§ 602.1, 603, 604, 606, 607; J.A. pp. 47-52 .)

In 1996, S&H Development Corporation of Myrtle Beach, L.L.C. ("S&H") purchased a 2.7 acre site in the City for $3.1 million. The site consisted of

six separate lots of record. At the time of purchase, the site included an 88 room inn ("St. John's Inn"), a restaurant and areas used for parking. Buildings on the site straddled property lines of the lots comprising the site. (Mot. Summ. J., Ex. 2, Sorrells' Dep.; J.A. pp. 55-56.)

S&H rented the restaurant and operation of the Inn to Sunrise Corporation, a South Carolina corporation ("Sunrise"). Pursuant to a verbal agreement, S&H assigned to Boulevard Development, L.L.C. ("Boulevard") all development rights to the site. S&H, Sunrise, and Boulevard are all controlled by Bruce W. Helm, Ronald Sorrells and/or Marilu Sorrells. (Mot. Summ. J., Ex. 2, Sorrells' Dep.; Ex. 3 and 4, Helm's Dep.; Ex. 5, Answer to Interrogs., No. 10; J.A. pp. 55-75.)

After considering various development schemes, Boulevard determined to construct a 14-story condominium/parking tower on lots 4 and 5, the westernmost portion of the site that were then being used for parking. Boulevard retained an architect and business consultant. It explored financing options, hired a real estate agency to pre-sell units, solicited bids for construction, entered negotiations with a builder and executed contracts for the sale of individual condominium units. (Mot. Summ. J., Ex. 3, Helm's Dep.; Ex. 5, Answers to Interrogs., Nos. 10,11, and 12; Ex. 6, Pegram contract; Ex. 7, Hoffman contract; J.A. pp. 60-62, 69-70, 77-87, 89-92.) These activities were pursued prior to Boulevard ever applying for CAB approval.

In August 1998, Boulevard applied for CAB approval. The CAB refused to approve the project, and Boulevard appealed to the City Council. At a workshop held on September 3, 1998, Boulevard appeared before the Council, then sitting in the capacity as the CAB. Its presentation attempted to address concerns raised, and included new renderings of the project. The project, as presented, proposed constructing a building twice as large as those already on site, within 52 feet of a nearby condominium structure, and on an area that comprised approximately 17% of the square footage of the site. (Mot. Summ. J. Ex. 8, Application for Bld. Permit; Ex. 9, Project Data and Excerpts from 9/3/98 Hr'g; J.A. pp. 93-99.) The project's loading and solid waste components were proposed to be sited at a location visible to the occupants of neighboring condominiums and the users of an adjoining public street. The project adjoined an environmentally sensitive swash and the storm water was to be handled by an underground exfiltration piping system. There was strenuous public opposition to the project, with concern raised over a number of issues, including, the size of the tower, its location on the site, its effect on nearby structures, its effect on traffic, the location of the dumpster and the effect on storm water. General anti-development and anti-growth complaints were also made. (Mot. Summ. J. Ex. 23, 25, Council Hr'g Excerpt; J.A. pp. 172-179 and 187-190.)

The Council refused to approve the project and issued a written order on September 8, 1998. An alternate proposal was requested. Boulevard appealed Council's denial to the state circuit court.

(Mot. Summ. J., Ex. 10, Order of Council; Ex. 11, Pet.; J.A. pp. 100-107, 172-192.)

In October 1998, Boulevard reapplied to the CAB, presenting the version of the project that had been turned down by the Council at its September hearing. (Mot. Summ. J., Ex. 12, Bragg's Dep.; J.A. pp. 108-110.) The CAB did not approve the project, and Boulevard again appealed to the Council. The Council considered the matter at a meeting held on November 10, 1998, where it declined to approve the project, citing the reasons previously given in its September order. Boulevard took a second appeal to the state circuit court. (Mot. Summ. J., Ex. 13, Council Order; Ex. 14, Pet.; J.A. pp. 112-118.)

In December 1998, this action was commenced, seeking damages from the City and the members of Council who had voted against the project.[1] The gravamen of the Complaint is that the failure to approve the project violated rights guaranteed by the state and federal constitutions.

In May 1999, the state trial court issued an order reversing the actions of the City. On appeal, the South Carolina Court of Appeals affirmed, holding that the actions of City were without evidentiary support and a remand would be futile. (J.A. pp. 417-426.)

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[1] By oral order issued on September 26, 2003, Judge Houck granted Appellants' motion to amend the Complaint to add as parties the members of the appointed board who had voted against the project. (Docket Entry 37; J.A. p. 8.)

In this action, Boulevard seeks damages for its pre-development costs, including architect and consulting fees, lost profits anticipated from the sale of condo units, expenses incurred to bond the architect's lien and potential expenses related to lawsuits expected to be filed by its contractor and realtor.

S&H seeks to recover damages purportedly inuring to it by virtue of being denied a debt free hotel, based on a verbal arrangement with Boulevard as to the application of the proceeds of the sale of condo units.

Sunrise seeks damages for profits lost when it slowed hotel and catering bookings in expectation of Boulevard getting a building permit. It (or a yet to be formed entity) also claims damages from anticipated profits resulting from managing bookings for the Inn and the to-be constructed tower over the next 20 years. (Mot. Summ. J., Ex. 5, Answers to Interrogs., Nos. 10-15; Ex. 15, Excerpts of Damage Brochure; J.A. pp. 69-71, 121-123.)

In 1999, Boulevard Conversions, L.L.C., was formed to convert the Inn and amenities to a horizontal property regime. S&H sold all its interest in the site to Boulevard Conversions, L.L.C., for $4 million. Boulevard Conversions subsequently sold the commercial component of the horizontal property regime (restaurant and front desk) and started selling the 88 condo units. The rights to develop a tower on this site are now controlled by Boulevard Conversions, L.L.C. (Mot. Summ. J., Ex. 16 Contract; Ex.17, Helm's Dep.; J.A. pp. 125-136.)

SUMMARY OF ARGUMENT

State preclusion rules would not bar Appellees from contesting the Appellants' federal due process, equal protection or Fifth Amendment causes of action. Under South Carolina law, *res judicata* applies only where the parties are the same, the subject matter of prior litigation is the same and the issues were actually adjudicated. None of these criteria are satisfied. Collateral estoppel has no application because the issues raised here were not decided by the state court, and did not have to be decided in order to support the state judgment. Even if it were otherwise, because there is no mutuality of parties in this suit and the state proceedings, a number of Appellees did not have a full and fair opportunity to litigate the issues raised, precluding the application of collateral estoppel.

Neither S&H nor Sunrise have standing because neither had any rights to construct the project at issue, and neither ever made any permit application. Because these parties cannot base their claims for relief on the legal rights of a third party, the district court was correct to dismiss them from the suit.

The district court's disposition of the federal due process claims wholly comports with precedent of this circuit. The discretion embodied in the design review process defeats a legitimate claim of entitlement to the design review permit. Absent such a right, there is no legally protected property interest for purposes of federal due process. The existence of a remedy to correct deficiencies of the

design review process (which was successfully used by Boulevard) further defeats a substantive and procedural due process claim.

The district court's disposition of the equal protection claim was proper. This claim is not barred by state preclusion rules, and Appellants failed to demonstrate any invidious, intentional discrimination on the part of Appellees.

The district court's disposition of the takings claims was appropriate. There was no physical appropriation of any of Appellants' property. The application of the design review ordinance was in pursuit of a legitimate governmental interest and did not deprive Appellants of all use of their property. The district court's analysis of a factored taking correctly balanced the considerations of Penn Cent Trans. Co. v. City of New York, 438 U.S. 104 (1978), and reached the correct result.

ARGUMENT

STANDARD OF REVIEW

Summary judgment is warranted if, from the totality of the evidence presented, including pleadings, discovery and affidavits, the court is satisfied there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. A party faced with a summary judgment motion must present evidence sufficient such that a reasonable juror could find, by a preponderance of the evidence, in his favor. Sylvia

Dev. Corp. v. Calvert County, Maryland, 48 F.3d 810, 817-818 (4th Cir. 1995).

Entry of summary judgment is mandated, "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and [upon] which that party will [have] the burden of proof at trial," because a "failure of proof [of] an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986).

A review of an award of summary judgment is *de novo*. Temkin v. Frederick County Comm'rs, 945 F.2d 716, 718 (4th Cir. 1991).

I. STATE PRECLUSION RULES DO NOT BAR APPELLEES FROM CONTESTING LIABILITY.

28 U.S.C. § 1738 obligates federal courts to apply state preclusion rules to determine whether a prior state court judgment has either issue or claim preclusion effect in a § 1983 action. Dionne v. Mayor and City Council of Baltimore, 40 F.3d 677, 682 (4th Cir. 1994)(citing 28 U.S.C. § 1738).

In South Carolina, to establish claim preclusion, or *res judicata*, one must show: (1) the identities of the parties are the same as in the prior litigation; (2) the subject matter is the same as the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent

jurisdiction. *Res judicata* bars a litigant from raising any issues which were adjudicated in a former suit, or which might have been raised in the former suit. Garris v. Governing Bd. of S.C. Reinsurance Facility, 511 S.E.2d 48, 57 (S.C. 1998); Pye v. Aycock, 480 S.E.2d 455, 458 (S.C. 1997).

Issue preclusion, or collateral estoppel, applies when a second action is based upon a different claim. The judgment in a prior action precludes re-litigation of only those issues actually and necessarily litigated and determined in the first suit. A party seeking issue preclusion "must show that the issue was actually litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment." Beall v. Doe, 315 S.E.2d 186, 191 (S.C. Ct. App. 1984). When the parties in the proceedings differ, non-mutual collateral estoppel may be asserted unless the party sought to be estopped lacked a full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him the opportunity to relitigate the issue. Graham v. State Farm Fire Cas. Ins. Co., 287 S.E.2d 495, 496 (S.C. 1992).

A. South Carolina courts would not apply *res judicata* to this case.

1. There is no identity of parties.

The parties in the state litigation were Boulevard and an entity denominated as "St. John's Inn" as appellants, and the City of Myrtle Beach, as respondent. Here, the parties-defendants include

the City and the individual members of the City Council and CAB who voted against the project. (J.A. pp. 266; 269; Docket Entry 38; J.A. p. 9.) Appellants maintain that the action against the City in state court precludes the individual defendants from contesting liability here because the individual defendants and the City are in privity. They are not.

"Privity exists when one has the same relationship to the issue determined as the party who litigated it." James F. Flanagan, South Carolina Civil Procedure ch. 90 § E(a) (2d ed. 1996). In the context of *res judicata* or collateral estoppel, "privity does not embrace relationships between persons or entities, but [instead] deals with a person's relationship to the subject matter of the [previous] litigation." Richburg v. Baughman, 351 S.E.2d 164, 166 (S.C. 1986).

In state court, the City was the litigant. Even if the final state court decision reached constitutional issues, the City's liability on a constitutional claim would attach upon proof of an official policy or custom that was utilized in derogation of federal rights. See Spell v. McDaniel, 824 F.2d 1380, 1384 (4th Cir. 1987). In contrast, the individual Appellees would be liable only if they were found to have acted in utter disregard of a known constitutional right. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The individuals have immunity defenses that are not available to the City. See Burtnick v. McLean, 76 F.3d 611, 612 (4th Cir. 1996). In short, the relationship of the City and the individuals to the subject matter of a lawsuit based on a constitutional

violation differs as to liability, the evidence required to establish liability, and available defenses. Accordingly, there is no privity between the City and the individual Appellees.

Further, since the individual defendants were not parties to the state proceedings and could not, as a matter of law, obtain a review of that decision as it affected them, they are not bound by that proceeding. See Wade v. Berkeley County, 498 S.E.2d 684 (S.C. Ct. App. 1995).

> Some litigants – those who never appeared in a prior action – may not be collaterally estopped without litigating the issue. They never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

Richburg, 351 S.E.2d at 166 (quoting Blonder-Tongue Labs., Inc. v. Univ. of Ill.

Found., 402 U.S. 313, 329 (1971)(citations omitted)).

Finally, two Appellants (Sunrise and S&H) were not parties in the state litigation. The identity of the parties in the state litigation and this litigation differs.

2. The subject matter of this case differs from the state court litigation.

The state proceedings were nothing more than an appellate review of an administrative determination made by a local zoning authority. S.C. Const., Article V § 11 grants to the circuit court "...original jurisdiction in civil and criminal cases and... such appellate jurisdiction as provided by law". Then applicable state enabling legislation devolved appellate jurisdiction to the circuit court of zoning matters. S.C. Code Ann. § 5-23-340 (West 1976.)

In the state litigation, Boulevard, the trial judge and the court of appeals all acknowledged that the issue there was whether there was evidence in the record to support the decision of the City, or whether the City had abused its discretion. Each relied on a state court decision setting the standard for the review of a decision of this very design board. See Peterson Outdoor Adver. v. City of Myrtle Beach, 489 S.E.2d 630 (S.C. 1997). Here, the issue is whether the Appellants were subjected to a policy or custom in derogation of federal constitutional rights, or whether the individual defendants, under color of state law, acted in deliberate indifference to known constitutional rights.

As to due process, Appellants must prove by-right entitlement to CAB approval, and as to equal protection, an irrational classification and purposeful intent to discriminate. See Sylvia Dev. Corp., 48 F.3d 810. The facts required to prove these

causes of action differ substantially from the facts required to prevail in the state litigation. The state proceedings rested on the sufficiency of evidence. The South Carolina Court of Appeals so held. (J.A. pp. 422-426.) Here, the proceedings turn on whether Appellants can establish a deprivation of federal rights pursuant to official policy or custom or on account of deliberate indifference to constitutional rights. Spell, 824 F.2d at 1384; Harlow, 457 U.S. at 818. The subject matter of the state litigation vastly differs from the subject matter of the action before this court.

The South Carolina Supreme Court has held that if it is questionable if a second cause of action is the same as the first, a test to be applied is whether the facts essential to the maintenance of each cause of action are identical, or if the same evidence would support each cause of action. Griggs v. Griggs, 51 S.E.2d 622, 626 (S.C. 1949). There is no doubt that the facts required to sustain the state case and this case differ, as does the evidence necessary to sustain each. The subject matter of the two suits also differs, precluding the application of res judicata.

3. Federal constitutional claims were not adjudicated in state court, nor could they have been.

While Boulevard raised constitutional issues in its state pleadings, it did not specify what constitution was in play. Even under the most liberal view of notice pleading, its state pleadings fall far short of providing fair notice that federal constitutional violations to support monetary

liability were being alleged. Even if alleged, they certainly were not tried.

Boulevard's argument in state court was based entirely on state law applicable to a review of zoning decisions. At trial, its counsel stated:

> Your Honor, it is the Appellants' position that the City of Myrtle Beach's denial must be reversed because the action was arbitrary, subjective, without evidentiary support, and really a pretense to stop the development of Myrtle Beach.
>
> ****
>
> In the Peterson case, the Supreme Court held that a zoning decision must be overturned if it is arbitrary or subjective, is based on an error of law, is without evidentiary support, and the Board acts arbitrarily and unreasonably, or when, in general, there is an abuse of discretion.

(Circuit Ct. Tr., J.A. pp. 289-290 and 332, 333.)

In its state appellate brief, Boulevard maintained the standard of review was based solely on Peterson Outdoor Adver., 489 S.E.2d 630, a zoning case where the issue was whether an abuse of discretion had occurred. The analysis of due process and equal protection in its appellate brief was based, not on the deprivation of a protected property interest or purposeful discrimination, but on the

unreasonableness of the decisions in light of the evidence. (Mem. Opposing Summ. J., Ex. 5, Boulevard's Final Brief, S.C. Ct. App.; J.A. pp. 427-433.)

The court of appeals decision, which is the law of the state case, affirmed the circuit court, but not on constitutional issues. The court affirmatively pronounced that the questions presented but two issues, to wit: (1) whether evidence existed to support the council's decisions; and (2) whether an improper substitution of judgment had occurred. (J.A. p. 423.) The court affirmed the circuit court because it determined that there was insufficient evidence to support the decisions of Council, and that a remand to the Council would be futile. (J.A. pp. 423-426.)

In South Carolina, an appellate court may affirm a trial judge's decision on any ground appearing in the record. If a correct result has been reached, a decision will be affirmed, even if error is made on another ground. The reasoning of a trial judge is not binding on an appellate court if the record discloses a correct result. Potomac Leasing Co. v. Otts Mkt., Inc., 358 S.E.2d 154, 156 (S.C. Ct. App. 1987). Appellants' protestations notwithstanding, the decision of the Court of Appeals, the final state judgment, did not reach federal constitutional claims.

State judges are bound to follow opinions of the United States Supreme Court U.S. Const. art. VI; See Manning v. Hunt, 119 F.3d 254 (4th Cir. 1997). South Carolina explicitly adheres to federal

precedent. See Worsley v. Town of Mount Pleasant, 528 S.E.2d 657 (S.C. 2000) (due process); Butler v. Edgefield, 493 S.E.2d 838 (S.C. 1997) (equal protection). The dearth of evidence proffered or argument made on constitutional issues in state court, and the reasoning of the state court of appeals dispels any contention that federal constitutional issues were decided. The circuit court's holding regarding due process, equal protection and taking undoubtedly arose from its view of the council having determined the appeals contrary to the evidence that was before it. No where in its voluminous order did the circuit court undertake an analysis of federal constitutional claims. Its holding regarding due process, equal protection and taking was, at best, *gratis dictum*, and in any event, not adopted by the Court of Appeals.

Finally, constitutional issues could not have been litigated in the state proceedings. The state proceedings were limited to a review of the record. The state proceedings presented no occasion to supplement the record, offer additional testimony or pursue discovery. The ability to litigate a violation of constitutional rights on an as-applied basis could not have been accomplished within the framework of the state administrative appeals. In South Carolina, *res judicata* will not be applied when claims could not be asserted, even when they rise out of common facts of prior litigation. PJ Const. Co. v. Roller, 340 S.E.2d 546, 565-566 (S.C. Ct. App. 1986).

B. Under South Carolina law, collateral estoppel would not preclude contesting liability in this case.

Collateral estoppel can only apply if constitutional issues were actually litigated in the state proceedings, and their adjudication was necessary to support the decision in the state proceeding. Because the parties in this action differ from those in the state court, it must also be demonstrated that the Appellants had a full and fair opportunity to litigate the issues in state court. Beall, 315 S.E.2d at 190; Graham, 287 S.E.2d at 496.

The decision of the state appellate court belies any credible claim that constitutional issues were actually litigated or finally adjudicated. Given the standard of review applied in the state proceedings, it was totally unnecessary to reach constitutional issues, as the adjudication of those issues was not required or essential to support the state court judgment. Finally, Appellees did not have the opportunity to fully and fairly litigate the constitutional issues. They could neither conduct discovery, supplement the record nor offer testimony. The individual Appellees were not even parties to the state litigation. South Carolina courts would not apply collateral estoppel to this case.

Appellants' reliance on defenses raised as a basis for preclusion misses the mark. In its administrative appeals, Appellants alleged arbitrariness and constitutional violations, *albeit* without specificity. This action alleges similar causes of action. It was appropriate to raise a

preclusion defense, because the state issues would have been disposed of in the state court.

Judge Houck did not permit a collateral attack of a state order, and did not shift any burdens. The transcript reveals his careful review of the state court judgment and his determination that it did not reach federal issues. He rightfully questioned Appellants' counsel, asking for the basis of the contention that federal issues had been adjudicated. (Tr. Summ. J. Hr'g; J.A. pp. 580-584.) Such is hardly inappropriate since it was Appellants' burden on its motion for summary judgment to prove the elements of *res judicata* and collateral estoppel.

Judge Houck did not acknowledge that South Carolina would bar re-litigation. He only stated that state issues would be barred were the case to be remanded upon an award of summary judgment on federal issues:

> Then, the case would go back to state court and you would have pending all of the state claims on which I don't think the defendants could successfully argue, there wasn't a prior adjudication that would preclude issues from being raised.

(J.A. p. 583.)

As to Appellants' contention that *res judicata* precludes litigating issues which might have been litigated in a prior action, suffice it to say that

Appellees were not required to defend a case in state court that Appellants never tried.

Throughout their brief, Appellants continually reference the order of the state trial court for the proposition that its findings and characterizations of Appellees actions are conclusive as to this case. To avoid redundancy, Appellees will address this contention but once. The state proceedings were tried and adjudicated strictly on state law, applying a standard of review of whether the acts of Appellees were supported by sufficient evidence. That proceeding did not (and could not) analyze Appellees' conduct under federal law. The final state court judgment did not reach any constitutional issues, state or federal. The judgment was based solely on two issues, whether there was sufficient evidence to support the decisions made, and whether a remand would be futile. The law of the case is what was decided on appeal. See Barth v. Barth, 360 S.E.2d 309 (S.C. 1987). Thus, the disposition by the appellate state court circumscribes the trial court's findings and characterizations of Appellees conduct to the context of whether, under state law, Appellees had abused their discretion in evaluating Appellants' project.

II. S&H AND SUNRISE DO NOT HAVE STANDING.

The District Court was correct to hold that S&H and Sunrise lacked standing. Neither S&H nor Sunrise had any rights in the project. Those rights belonged solely to Boulevard (J.A. pp. 55-75.) Neither S&H nor Sunrise applied for a permit. Only

Boulevard Development did (J.A. 94-95.) The damages claimed by S&H and Sunrise are based on the legal rights and interests of Boulevard to a permit, not on their rights to that permit. To have standing, a party must rest its claim to relief on its own legal rights and interests, not on the legal rights or interests of other parties. Warth v. Seldin, 422 U.S 490, 500-501 (1975). Because S&H and Sunrise base their claims on the rights of a third party (Boulevard), their standing fails. Because neither applied for a permit, their standing fails. See S. Blasting Servs. Inc. v. Wilkes County, North Carolina, 288 F.3d 584 (4th Cir. 2002).

City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687 (1999), did not involve litigants who were strangers to the permitting process. The plaintiffs were the successors in interest to Ponderosa Homes, who had started the permitting process, which the Del Monte parties continued pursuing after the purchase. The parties before the court had actually been denied a permit. See Del Monte Dunes at Monterey, Ltd v. City of Monterey, 95 F.3d 1422, 1425 (9th Cir. 1996).

The fact that an entity denominated as "St. John's Inn" was a party to the state litigation does not confer standing to S&H or Sunrise. "St. John's Inn" is a non-entity, and under South Carolina law, a suit brought in a name which is not a legal entity is a nullity. Glen v. Dupont DeNemours & Co. Inc., 174 S.E.2d 155 (S.C. 1970).

Assuming the name "St. John's Inn" made S&H and Sunrise parties to the state proceeding, the

standard for standing in the state action differs from the standard required here.[2] In the state action, a party with a substantial interest could appeal (CAB Ordinance, § 607; J.A. pp. 52-53.) Under state law, that would include an adjacent property owner. Spanish Wells Prop. Owners Ass'n v. Bd. of Adjustment of the Town Hilton Head Island, 375 S.E.2d 487 (S.C. Ct. App. 1987), rev'd on other grounds, 267 S.E.2d 160 (S.C. 1988). A neighbor may be affected by a zoning permit decision, but it could not hardly be maintained that he had rights to the permit, itself. The same holds true for Sunrise and S&H.

The injuries claimed by S&H and Sunrise are like those of any affected third party such as an architect, consultant, builder or realtor, and are not traceable to the denial of a permit. See Odal Typographers Inc. v. City of New York, 560 F. Supp. 558, 560 (S.D.N.Y. 1983)(stating, "While such [third parties] may possess a property interest in the form of an 'account receivable,' their expectation as to the corporations' ongoing viability cannot be characterized itself as [a protected property interest). Were the rule otherwise, all creditors, officers, employees or anyone else who relied on the ongoing production of corporate income would be proper plaintiffs to this (§1983) suit").

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[2] Since ownership of the name "St. John's Inn" belongs only to S&H, Sunrise has no basis to claim to have been party to the state proceedings. (Docket Entry 31; J.A. p. 8.)

III. THE DISTRICT COURT CORRECLTY DISPOSED OF THE DUE PROCESS CLAIMS.

The law of this circuit is clear, and longstanding. To establish a federal procedural due process claim, it is incumbent for Appellants to demonstrate that they had a property right that was denied by Appellees without due process of law. Sylvia Dev. Corp., 48 F.3d at 826. To prevail on a substantive due process claim, they must demonstrate that they had a property interest that was denied by Appellees, and that the acts of Appellees were so far afield of the outer limits of legitimate governmental action that no process could cure the deficiency. Id. at 827.

A. Appellants Did Not Have a Property Interest in a Permit.

To prove the existence of a property interest, Appellants must demonstrate "a legitimate claim of entitlement" to CAB approval. Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 577 (1972). A subjective, unilateral expectation that approval would be given is not enough. Id. at 577 ; Sylvia Dev. Corp., 48 F.3d at 826. The claim of entitlement must be found in state law, and if that law gives the local authority discretion to determine whether a permit should issue, there is simply no legally protected property interest for purposes of federal due process. Gardner v. Baltimore Mayor and Council, 969 F.2d 63 (4th Cir. 1992); Biser v. Town of Bel Air, 991 F.2d 101 (4th Cir. 1993), cert. denied, 510 U.S. 864 (1993).

The district court's ruling is in lockstep with precedent. There is little doubt but that CAB review calls for the exercise of discretion. The entire process contemplates the exercise of judgment. (Mot. Summ. J., Ex. 1, CAB Ordinance; J.A. pp. 45-53.) As found by the district court, and in keeping with the law of this circuit, this circumstance defeats the ability of Appellants to establish entitlement to CAB approval. CAB approval was always contingent on the exercise of discretion by the applicable reviewing board. Appellants' expectation of approval, no matter how sincere, is simply not enough to confer a property interest protectable by the Due Process Clause of the federal constitution.

Further, the CAB process allowed a post deprivation remedy through the state judicial system, a remedy the Appellees pursued with success.

> A due process violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process.

Tri-County Paving, Inc. v. Ashe County, 281 F.3d 430, 437 (4th Cir. 2002); see also Sylvia Dev. Corp., 48 F.3d at 829.

B. Appellants' Ownership Theory.

Appellants call on this Court to abandon precedent and adopt the proposition that ownership of property, itself, is beyond the reach of local

regulation. The Court should refrain from doing so, for obvious reasons.

As an initial matter, rights protected in a § 1983 action are those grounded in state law. The Fourteenth Amendment does not create property rights. Bd. of Regents, 408 U.S. at 577; Tri-County Paving 281 F.3d at 436. Parameters of property ownership and use are strictly state created rights, honored by federal courts when written and applied consistent with constitutional principles. To follow Appellants' lead would result in this Court rendering state regulation of property wholly subservient to the owner's desire to do what he wishes with his property. It would turn on its ear longstanding precedent that acknowledges the state's interest and right to regulate land use. Enforcement of the law of nuisance, zoning or planning would come at great risk to public coffers, much less the general health, safety and welfare. Furthermore, the docket of this Court would swell exponentially if any regulation or curtailment of property ownership were recognized as a federal case.

Contrary to the implication, the Constitution is alive and well in the context of land use. Land use regulations, like any other state or local law, must comport with principles of due process. That means facially a law must be neither vague nor overboard. Abernathy v. Conroy, 429 F.2d 1170 (4th Cir. 1978). When a law involves discretion, it must include standards to limit the subjective exercise of that discretion. S. Blasting Servs., Inc., 288 F.3d at 595; Geo-Tech Reclamation Industries Inc. v. Hamrick, 886 F.2d 22 (4th Cir. 1989). To provide a check on

its misapplication, a remedy for review is necessary. Sylvia Dev'p. Corp., 48 F.3d at 829. Taken together, these precepts require a land use regulation to apprise the property owner of the rules by which his application will be judged, the use of those rules, and a means to cry foul and have the call corrected when the rules are misapplied. Such is exactly what occurred here. There could not be purer due process.

C. Appellants' Behavior Theory.

Appellants contend there is no due process protection from "arbitrary and oppressive governmental behavior in the land use context". (Appellants' Brief, p. 33.) This assertion is simply wrong. Sylvia Dev. Corp. and Tri-County Paving, each land use cases, establish the principle that due process requires the availability of a remedy to check and correct the type of governmental conduct about which Appellants complain. The reason these cases were decided as they were, and why the district court here ruled as it did, is because the "arbitrary and oppressive governmental behavior" could be corrected. Sylvia Dev. Corp., 48 F.3d at 829; Tri-County Paving, 281 F.3d at 441. Appellants' real complaint is not with a lack of remedy, but with the remedy itself.

Appellants' attempt to distinguish aesthetic zoning from other zoning issues, like rezonings, variances or special exceptions, is transparent, and as found by the district court, is a difference without a distinction. Appellants knew, from day one, that the project required CAB approval. They knew, from day one, that CAB approval was part of the zoning

process, and they were not eligible for a building permit until that approval was secured. These Appellants are no different from the rezoning, variance or special exception applicant. Regulations applicable to the project required a review that embodied discretion, no different from discretion attendant to a rezoning, variance or special exception request.[3] The nature of "surprise" when a permit is denied is the same, as in each instance it arises from the exercise of discretion.

D. Appellants' Theory of Theoretical Discretion.

Appellants contend the findings of the state trial court that Appellees' conduct was egregious somehow circumscribes the discretion devolved upon them by the CAB ordinance. Such is not the case. Appellants contend here what the applicant did in Sylvia Dev. Corp., 48 F.3d at 810. They equate a finding of arbitrariness in a state administrative procedure with arbitrariness under the due process clause. The two are not the same, and this Court has so held on numerous occasions. See Sylvia Dev. Corp., 48 F.2d at 829; Gardner, 969 F.2d at 71; Biser, 991 F.2d at 105. Due process requires inquiry of whether discretion exists, not how discretion is exercised. Gardner, 969 F.2d at 68.

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[3] For Appellants to insist that their project was consistent with zoning ordinances in effect at the time of application is incorrect. CAB approval is part of zoning, and compliance with it is as important as compliance with other aspects of the zoning regulations. See Peterson Outdoor Advertising, 489 S.E.2d 630.

Appellants' suggestion that the CAB ordinance did not devolve discretion sufficient to withstand a due process claim falls short. Precedent of this circuit could not be clearer: the existence of discretion in a permitting process, i.e., the ability to say no, precludes the establishment of a protected property interest. See United Land Corp. of Am. v. Clark, 613 F.2d 497, 501 (4th Cir. 1980) (where the court noted the law did not require an administrator to "... issue the permit perfunctorily"); Gardner, 969 F.2d at 68 (where the court noted "any significant discretion...defeats the claim"); Scott v. Greenville County, 716 F.2d at 1418-1419 (4th Cir. 1983) (the court noting municipal authorities "lacked all discretion"); Biser, 991 F.2d at 104 ("any significant discretion"); Sylvia Dev. Corp., 48 F.3d at 826 (denying a due process claim in light of reviews requiring interpretive judgment and discretion).

Absent the issuance of a permit being ministerial, or certainly close to it, there exists no legitimate claim of entitlement that triggers due process protection. A review of the CAB objectives, and the criteria to be used in attaining them, makes abundantly clear that the CAB had not just discretion, but substantial discretion, when considering a project. The CAB was not required to "issue the permit perfunctorily", and the process involved interpretive judgment so that even if Boulevard believed its submission comported with stated criteria, such would not be determinative because "the question of whether the criteria are met must be resolved by the exercise of judgment." Sylvia Dev. Corp., 48 F.3d at 826.

E. Appellants Received Due Process.

Because Appellants had no protected property interest in CAB approval, there is no viable due process claim, and the inquiry should stop. However, because Appellants have addressed other elements of due process, a reply is in order.

Appellants imply that the hearings were unfair and that the state determination of arbitrariness entitle them to damages under § 1983. Taking the latter issue first, the fact that the state court found the acts of Appellants to have been without evidentiary support, and thus arbitrary, is not dispositive of the issue of whether there has been a due process violation. This Court has been clear that a violation of state law is not tantamount to a violation of a federal right. Sylvia Dev. Corp., 48 F.3d at 829. This Court has repeatedly recognized that a state court order requiring approval of an application does not equate to the applicant having had a preexisting entitlement to that approval. Biser, 991 F.2d at 105. This Court has been steadfast that, if a permit could have been issued on non-arbitrary grounds, there is no federal due process claim. Gardner, 969 F.2d at 71.

Appellants' apparent displeasure with the remedy provided by state law is unfortunate, but does not assist their cause. The fact remains that the remedy accommodated exactly what they sought: a permit. Costs incurred during a permitting process are an inherent aspect of the process and have never been acknowledged as compensable.

Otherwise, Sylvia Dev. Corp., Gardner, and Biser would have been decided differently.

Aesthetic zoning is sanctioned by state law as a legitimate governmental purpose. Peterson Outdoor Adver., 489 S.E.2d at 234. The federal judiciary has recognized that interest. See Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).

The reasoning of this Court in S. Blasting Servs. is germane:

> Even if plaintiffs could prove that they had a property interest and that the County somehow deprived them of that interest by making it more difficult to operate an explosives business, plaintiffs' substantive due process claim fails under the third prong of the Sylvia test. The County's actions obviously did not fall beyond the outer limits of legitimate governmental action. Instead, the County's actions were rationally related to a legitimate governmental purpose. Therefore, plaintiffs "cannot demonstrate that the County's actions were arbitrary or irrational as required by Sylvia and Rucker.

S. Blasting Servs., 288 F.3d at 594 (citation omitted).

Neither public opposition nor a council sympathetic with that opposition gives rise to a

substantive due process claim. This Court has recognized the reality of zoning as "inescapably a political function", and has held that it is not "pernicious per se for a zoning authority to be influenced by political pressure in the community". Sylvia Dev. Corp., 48 F.3d at 827, 829. It is for this very reason that due process requires a remedy to cure deficiencies.

As to procedural due process, this Court in two recent decisions addressed the level of pre-deprivation and post-deprivation process to which an applicant is entitled. See S. Blasting Servs., 288 F.3d at 595; Tri-County Paving, Inc., 281 F.3d at 436. Appellants received that level of process.

There is no contention that notice and opportunity to be heard were denied. The contention is the hearings were unfair because the decision makers were biased. Viewing the evidence on this issue in the light most favorable to Appellants reveals that the mayor attempted to persuade a member of the appointed CAB board to vote against the project. His effort proved unsuccessful. No other member of the council (who, incidentally, were the final decision makers), was even aware of this contact or condoned it. (Reply to Mem. Opposing Summ. J., Ex. 2-8, J.A. pp. 537-559.) The mayor's vote was not determinative, as Appellants' plans were rejected unanimously at the first hearing and by a 6 to 1 vote at the second. Even if the mayor's conduct is deemed egregious, unethical or improper, there was no basis proffered by Appellants to warrant projecting his bias to the remainder of the council.

The implication that the second de novo hearing was predetermined is wholly unsubstantiated. At the second hearing, council was reviewing the project it had rejected in September. Appellants' architect acknowledged as much, and a comparison of the exhibits introduced at these hearings proves as much. Of the 47 exhibits introduced at the November hearing, at least 18 had been introduced in the September hearing. The remaining exhibits included either foam board mounted versions of exhibits introduced in September, or were exhibits that had nothing to do with the physical appearance of the project. (Mot. Summ. J., Ex. 20, 21; J.A. pp. 145-168; Supp. Mem., Ex. 4, 5; J.A. pp. 630-643.) The executive session conducted prior to the second hearing was to seek legal advice regarding allocation of time to parties wanting to be heard, and options available to the Council when considering the same application for a second time. The Council knew what was coming because of the second application that had been made to the appointed board and publicly noticed work sessions. They sought advice as to available options. At the second hearing, Appellants were given more time to present their case than called for by the ordinance, and at least one councilman attempted to open the door for additional information from Appellants during Council deliberations. (Supp. Mem. Summ. J., Ex. 19, J.A. 144-143); Mot. Summ. J., Ex. 9; J.A. pp. 661-662.) Such is hardly indicative of bias.

Appellants were accorded all the notice and hearings required by the CAB ordinance. Appellants were accorded all post-deprivation process as

provided by the ordinance and state law. Appellants successfully obtained the permit it sought by way of that very process. Appellants have failed to demonstrate a denial of procedural due process. See Tri-County Paving, 281 F.3d at 436-437.

IV. EQUAL PROTECTION.

In Sylvia Dev. Corp., this Court addressed an equal protection argument in a similar context and stated:

> The Equal Protection Clause limits *all* state action, prohibiting any state from denying a person equal protection through the enactment, administration, or enforcement of its laws and regulations. Even though a state law is facially neutral, its administration or enforcement can affect an unequal application by favoring one class of persons and disfavoring another. If the classification utilized is explicitly stated on the face of the statute or in the reasons given for its administration or enforcement, then the equal protection analysis requires us to determine whether an appropriate relationship exists between the legislative purpose and the classification adopted to achieve that purpose. On the other hand, if a classification is not explicitly stated, the plaintiff bears the initial burden of proving that a classification was nonetheless intentionally utilized.

> Snowden v. Hughes, 321 U.S. 1, 8, 64 S. Ct. 397, 401, 88 L.Ed 497 (1944). And only if the use of a classification is thus established does the equal protection analysis proceed with the inquiry into whether the classification furthers a legitimate legislative purpose. Sylvia Dev. Corp., 48 F.3d at 818-819.
>
> * * * * *
>
> Where a classification does not appear does not appear on the face of a statute and does not officially state it as a reason for administrative action, the plaintiff has the burden of proving that the classification was actually utilized in the administrative action, and that its use was intentional and purposeful.

Id. at 820.

Appellants argue that because their high rise was denied in the face of other high rises being approved, a case for a violation of equal protection exists. To have survived summary judgment on this theory, it was incumbent for them to show that the fact that this project was a high rise was the basis of Appellees' decision, and prompted the Appellees to engage in intentional, purposeful discrimination. See Sylvia Dev'p Corp., 48 F.3d at 820.

There is no evidence that the project was rejected because it was a high rise. The only evidence is that the project was rejected because of its facade treatments, its location on the site, and issues pertaining to the dumpster facilities and

storm water runoff. (Orders of Council, J.A. p.102; 112-113). Appellants have failed to demonstrate that their project being a high rise was the basis of its rejection.

Simply because high rises have been approved in the past, does not *per se* render Appellants' project "similarly situated." There is no evidence of any similarity between Appellants' project and other high rises, other than the fact that other high rises exist. As to the Caravelle parking garage, the only evidence in the record is that it differs, substantially, from that of Appellants. (Mot. Summ. J., Ex. 26; Kershner Affidavit, J.A. pp. 193-196.)

Even if Appellants' high rise was similarly situated, it was Appellants' burden to demonstrate purposeful discrimination. As noted in Sylvia Dev. Corp., if disparate treatment alone were sufficient to warrant a constitutional remedy, every mistake of a local zoning authority that resulted in an individual being treated differently from another similarly situated would rise to the level of a federal constitutional claim. Sylvia Dev. Corp., 48 F.3d at 818-819. As to the contention that a state court ruling established a prima facie equal protection claim, the Sylvia Dev. Corp. court held:

> We reject appellants' theory as a matter of law. While an equal protection claim must be rooted in an allegation of unequal treatment for similarly situated individuals, a showing of such disparate treatment, even if the product of erroneous or illegal state action, is

> not enough by itself to state a constitutional claim.

Id. at 825.

There is no evidence that these Appellants were subjected to purposeful, invidious discrimination. Opposition to the project was varied. Complaints included the following: the size and siting of the tower; its shadowing effect on adjoining structures; issues of disruption of view; potential wind tunnel effects; storm water effects; the location of the dumpster; traffic; and noise. (Mot. Summ. J. Ex. 23-25; J.A. pp. 171-192.) At most, what is revealed is that the public was opposed to the project for a variety of reasons, some of which were relevant to CAB review and others not.

> While discriminatory motivations of people who testify before a decision making board might in limited circumstances be probative of the board's motivations, this could only be true where public testimony was overwhelmingly opposed to a project for a distinct discriminatory reason, and board members where clearly swayed by that public opposition, fully aware of its basis in discrimination and prejudice.

Id. at 824.

This reasoning has application here. The opposition to the project was not confined to a distinct

discriminatory reason, and there is no evidence that Appellees knowingly acted in response to any deliberate or discriminatory classification. The decisions made had a rational relation to CAB review, which is all that is required when a suspect class is not implicated. See Id. at 820.

Finally, responding to public opposition does not rise to the level of a constitutional violation. This Court has recognized the politics inherent to zoning. In Sylvia Dev. Corp., this Court made note of an elected zoning official's responsibility to mediate between developers, residents, commercial interests and those who oppose and support growth and development. Id. at 828. The record here reveals legitimate issues being raised pertaining to aesthetic review. The record here reveals Appellees were pursuing a legitimate, governmental concern. Their decision was overturned, not because they were acting outside the scope of a legitimate state interest, but because of insufficient evidence.

These Appellants are like the litigant in Sylvia Dev. Corp. The most they could prove if this issue were to be tried is that, perhaps, similarly situated developers were treated differently, without an adequate evidentiary basis for the differing treatment. Such does not give rise to a viable claim for a violation of equal protection, and the district court was compelled to grant summary judgment for Appellees on the equal protection claim. Id. at 825.

V. THE DISTRICT COURT CORRECTLY DISPOSED OF THE TAKINGS AND INVERSE CONDEMNATION CLAIMS.

A. Appellants' So-Called Antecedent Rights.

Appellants seem to assert that because their project met technical requirements of the zoning ordinance pertaining to matters as use, height, setback and density, they had a "right" to build the project as proposed, which "right" was denied by virtue of Appellees' permit denial. These Appellants had no such "right."

Appellants were required, in addition to complying with the technical requirements of zoning regulations, to secure CAB approval. They had no right to build the project until that approval was given. The state Court of Appeals so held.

> As previously noted, respondents' building plan met all requirements of the City zoning ordinance and building codes except for CAB approval.

(J.A. p. 423) (emphasis added.)

In short, Appellants had no "antecedent property rights" to build the project without first having secured CAB approval.

B. The Adjudicatory Delay.

Absent deprivation of all economically viable uses of land, a delay in obtaining a building permit is a non-compensable incident of ownership, under state and federal law. See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Sea Cabins on the Ocean, IV Homeowners Ass'n. v. City of N. Myrtle Beach, 548 S.E.2d 595 (S.C. 2001). Appellants assert, and for the first time, that the delay was extraordinary and somehow traceable to Appellants. The record does not substantiate this assertion.

First, CAB denial did not deprive Appellants of all economically viable uses of the site. In fact, the denial of CAB approval had no effect whatsoever on the uses of the site. The inn and restaurant remained open, and the area of the site proposed for the high rise remained available for parking (Mot. Summ. J., Ex. 28; J. A. pp. 201-203.)

Second, the delay about which Appellants complain was not out of the ordinary. Appellant Boulevard first applied for CAB approval in August 1998. By November 1998, it had been through that process, twice. The Appellants promptly issued final decisions, on September 8 after a September 3 hearing, and on November 25, after a November 10 hearing. Such could hardly be termed dilatory.

The delay about which Appellants really complain is the time it took for its administrative appeals to be judicially reviewed. Appellees have no control over the appellate trial dockets, and there

has never been any assertion, much less any proof, of bad faith litigation.

The district court correctly disposed of the inverse condemnation and taking claims. The delay incurred here was a by-product of the adjudicatory system, and as found by the district court, not so extraordinary as to raise constitutional implications.

C. Penn Central Analysis.

As noted by the district court, even if the adjudicatory delay triggered a cognizable harm under takings jurisprudence, to determine if that harm worked a taking would require analysis under Penn Central and its progeny. See Penn Central, 438 U.S. 104; See also Tahoe-Sierra Preservation Council, Inc. v. Tahoe-Sierra Planning Agency, 535 U.S. 302 (2002). Penn Central would require consideration of the extent to which the regulation interfered with reasonable investment – backed expectations, the regulation's economic effect on the landowner and the character of the government action. Penn Central, 438 U.S. 104 The district court applied these factors to the facts of this case and correctly concluded that no taking occurred.

As to the character of the contested action, Appellees were pursuing a legitimate state interest. South Carolina affirmatively sanctions aesthetic zoning, and its supreme court has specifically upheld this very CAB ordinance. Peterson Outdoor Adver., 489 S.E.2d at 234. The fact that Appellees erred in the assessment of the project does not change the

character of their action or remove it from the realm of a legitimate interest.

The denial of CAB approval did not, in any way, affect Appellants' use of their property. Hotel and restaurant operations continued. The fact that bookings were slowed was because of Appellants' unilateral, subjective expectation that they would receive CAB approval, an expectation not protected by law for reasons cited herein. As to the economic effect of the denial, Appellants were able to sell the property at a profit of over $800,000.00, with the CAB denial still in place. (Mot. Summ. J. Exs. 2, 16, 17; J.A. pp. 54-58, 124-136.) As found by the district court, such could hardly be "economic harm" in the constitutional use of that phrase.

D. Exactions.

This case does not involve exactions. This case arises from the denial of a permit, not the award of one conditioned on compliance with certain conditions. In Del Monte Dunes, 526 U.S. 687 (1999), the Supreme Court held the rough proportionality analysis of Dolan v. City of Tigard, 512 U.S. 374 (1994) is inapplicable in cases involving permit development denials. Del Monte Dunes, 526 U.S. at 702, 703.

In any event, the Appellants did not exact anything from Appellees. Appellants' reference to an "exacted" prescriptive view easement and public sidewalk were issues that came before the CAB. On appeal to the City Council, neither of these requirements was imposed. The findings of the

Council pertaining to location and facade treatments of the tower and parking garage, the location of the dumpster facilities and the operation of the storm water management plan were not exactions. They were judgments reached in applying CAB review criteria. The state court did not find consideration of these issues inappropriate. It merely found that there was not sufficient evidence to support the decisions reached with respect to them. (J.A. pp. 417-426.)

CONCLUSION

The district court appropriately disposed of the issues raised by this case. State preclusion rules would not bar Appellants from contesting liability for the due process, equal protection and takings claims. Two of the Appellants, Sunrise and S&H, have no standing. Appellants have no viable due process, equal protection, inverse condemnation or taking claims for the reasons herein stated.

It is respectfully submitted that the decision of the district court is correct, and should be affirmed.

REQUEST FOR ORAL ARGUMENT

Due to the numerous legal issues implicated by this action, Appellees believe oral argument would benefit the court in its review.

Charleston, South Carolina
February 8, 2005

/s/

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS
HON. J. STANTON CROSS, JR.,
MASTER-IN-EQUITY
FIFTEENTH JUDICIAL CIRCUIT

CASE NOS. 98-CP-26-3516, 98-CP-26-4311

Boulevard Development and St. John's Inn, — Respondents,

The City of Myrtle Beach, — Appellant.

RESPONDENTS' FINAL BRIEF

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ARGUMENT[74]

A. STANDARD OF REVIEW

As a preliminary matter, it must be noted that the parties disagree as to the appropriate standard of review. Appellant argues this Court must reverse Judge Cross if there is any evidence to support the City's decision to deny Respondents CAB approval.[75] In support of its position, Appellant relies on *Peterson Outdoor Advertising* v. *City of Myrtle Beach,* 489 S.E.2d 630 (S.C. 1997), wherein the South Carolina Supreme Court strongly affirmed Judge Cross' ruling that Appellant had been arbitrary and subjective in denying CAB approval.[76]

Respondents agree that *Peterson* controls this appeal.[77] However, Appellant misreads the standard of review employed in *Peterson.* In *Peterson,* the South Carolina Supreme Court specifically held a zoning decision must be overturned if: 1) it is arbitrary or subjective; 2) it is based on errors of law; 3) it is without evidentiary support; 4) the board acts

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[74] Judge Cross' Order provides an in-depth analysis as to why Appellant's denials must be reversed. Respondents adopt Judge Cross' reasoning *in toto,* and dedicates the Argument section of this Brief to respond to Appellant's claims.

[75] Appellant's Initial Brief, p. 5.

[76] Ironically, Judge Cross was also the trial judge in *Peterson* and keenly aware of the law and issues in this case.

[77] On page 10 of Appellant's Initial Brief, Appellant states *Peterson* "is the seminal case for the issues at hand."

arbitrarily or unreasonably; 5) or where, in general, there is an abuse of discretion. *Id.* at 633. Thus, contrary to Appellant's argument, even if there is "evidence" to support Appellant's CAB denial, that denial must be reversed if it is arbitrary or subjective, based on errors of law, without evidentiary support, unreasonable, or there is an abuse of discretion.

The Supreme Court in *Peterson* held Appellant's CAB denial for the billboards at issue in that case was completely arbitrary and subjective, and as stated above, strongly affirmed Judge Cross on that point The Court specifically rejected the City's argument that it could apply subjective standards or reject a project for solely arbitrary and subjective reasons, and stated "[w]hat one person may find unsightly or inharmonious may be pleasing to another." *Id.* Because there is overwhelming evidence in this case to support Judge Cross' Order reversing Appellant's CAB denial for the same reasons relied on in *Peterson,* his Order must be affirmed.[78]

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[78] Contrary to Appellant's argument, our appellate Courts have always given great deference to the trial court's findings. It has always been the law that our appellate courts must affirm the trial court if at all possible, and there is a presumption that the trial court's ruling was correct. *See, e.g., Horton v. Greyhound Corp.*, 128 S.E.2d 776 (S.C. 1962).

B. THE RECORD DOES NOT CONTAIN ANY OBJECTIVE, NONARBITRARY EVIDENCE TO SUPPORT APPELLANT'S CAB DENIALS, AND THE BURDEN IS ON APPELLANT TO PROVIDE SUCH EVIDENCE

Appellant incorrectly argues the burden was on Respondents to show their plans should have received CAB approval. The right to use one's property consistent with an approved use in a zoning ordinance is a fundamental property right, and it is clearly Appellant's burden to show objective, nonarbitrary facts as to why Respondents' plans should not be approved. Prior to the first appeal before City Council, City Attorney Joe Wettlin specifically told Council that "Council must state facts that support the decision."[79] The CAB denials, and Orders of City Council, are wholly void of any facts to support the arbitrary and subjective alleged reasons for denial recited in those documents.[80]

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[79] Transcript of September 3, 1998 City Council Hearing, Circuit Court Record on Appeal, Item 4, (R. p. 288.11. 5-9).

[80] *See* CAB Disapproval Form, Circuit Court Record on Appeal, Item 3, (R. pp. 483, 484); Orders of City Council, Circuit Court Record on Appeal, Items 5 and 9, (R. pp. 271-282

C. JUDGE CROSS CORRECTLY RULED APPELLANT'S DENIALS VIOLATED RESPONDENTS' DUE PROCESS AND EQUAL PROTECTION RIGHTS

Judge Cross ruled Respondents' due process rights were violated in that Appellant refused to provide objective reasons and evidence to support its denials, and refused to give Respondents any objective guidance as to what they could do to gain Appellant's approval. These findings are correct and must be affirmed.

Our Supreme Court specifically told Appellant in *Peterson, supra* that it can not simply rely on subjective or arbitrary reasons to deny a building permit or CAB approval. Appellant, however, refused to heed that mandate and finds itself in the same position. Every reason relied on by Appellant is wholly arbitrary or subjective, and does not provide Respondent any guidance as to what it could do to get Appellant's approval.

Appellant can not simply say, for example, that Respondents' parking garage wall is not decorative enough without also saying specifically what it does not like about the wall, giving Respondents objective guidance on what changes could be made to get approval. Similarly, Appellant can not simply say Respondents' storm water management plan does not "adequately address Appellant's concerns," when everyone that has reviewed the plan, including the Department of the Interior and Appellant's own staff, stated Respondents' plan would actually be beneficial to the

water quality in the swash and reduce the runoff quantity in the swash.

Further, Appellant can not simply say Respondents' plans are "incompatible" or "inharmonious" with others in the neighborhood. This is what Appellant did in *Peterson,* and was soundly admonished by our Supreme Court. Contrary to Appellant's argument, it does not have unfettered discretion to reject an applicant's plans. Appellant's ordinances unquestionably allow Respondents to build a high rise on their property. This right can not be denied by Appellant's arbitrary and subjective whims, or left to the subjective desires of neighboring property owners.[110]

Appellant's actions have left Respondents scratching their heads. Appellant has given no objective guidance as to how Respondents could change their plans in order to get Appellant's approval. Respondents have repeatedly showed good faith, and told Appellant it would: 1) do whatever Appellant wanted with regard to the trash compactor and the parking garage wall; 2) that money was no object; 3) add a sidewalk for Appellant; 4) add additional landscaping, etc., What else can Appellant do? Due process does not require

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[110] See. *e.g., State ex rel. Garofalo* v. *Desselle,* 149 So.2d 621 (La. Ct. App. 1963) (ordering the issuance of a building permit for a two-family dwelling because one can not be denied based on some residents wanting the subdivision to remain only single-family dwellings); *Spann v. City of Dallas,* 235 S.W. 513 (Tex. 1921) (holding that a decision left to the "caprice, whim or arbitrary discretion of a board, or an officer, or to the desires of the owners of near-by property" is invalid).

an applicant to keep spending time and money to revise plans and keep appearing before Appellant with the hope that someday its plans may be approved, without even knowing what is wrong with the plans.

Appellant's denials also deprived Respondents of equal protection under the laws. As stated above, Appellant gave no reason why Respondents were required to comply with an arbitrary and greater setback requirement than every other citizen in Myrtle Beach. Respondents complied with Appellant's setback requirements, but Appellant won't let Respondents build their building within 52 feet of the Sea Mark Tower. Appellant therefore created a greater setback requirement for Respondents' property that does not apply to every other property owner. This is a per se equal protection violation, and correctly held as such by Judge Cross.

Also, Respondents showed the Caravelle parking garage, located just one block north of Respondents' property, was recently approved with a completely blank wall. Appellant, however, would not say why Respondents' highly decorative wall was not good enough. Therefore, Respondents were singled out and treated differently from another developer just one block away. This is another per se equal protection violation, and correctly held as such by Judge Cross.

Further, several CAB members commented they never considered technical aspects such as storm water management when reviewing a

project.[111] Such determinations have always been made by City staff and engineers charged with that responsibility and knowledge. Thus, CAB took it upon themselves to go beyond their duties to review building exteriors, landscaping, etc. This is yet another is a series of clear equal protection violations committed by Appellant.

Appellant argues Respondents' rights were not violated because CAB review is a site specific exercise. This argument ignores the concepts of due process and equal protection. Everyone who comes before Appellant must be considered on its merits, but the fundamental requirements of equal protection and due process are that everyone is treated the same under the same guidelines and procedures. Appellant clearly violated these concepts in how it treated Respondents as compared to other developers and developments.

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[111] Transcript of October 1, 1998 CAB Hearing, Circuit Court Record on Appeal, Item 7, (R. pp. 617, 618).

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF HORRY

Boulevard Development and
St. John's Inn,

Plaintiffs,

-versus- CASE NO: 98-CP-26-3516

The City of Myrtle Beach,

Defendant.

Boulevard Development and
St. John's Inn,

Plaintiffs,

-versus- CASE NO: 98-CP-26-4311

The City of Myrtle Beach,

Defendant.

THE HEARING HELD BEFORE
HONORABLE J. STANTON CROSS, JR.
MASTER-IN-EQUITY FOR
HORRY COUNTY, SOUTH CAROLINA

Tuesday, February 23, 1999

2:00 p.m. – 5:00 p.m.

The following is the hearing held before Honorable J. Stanton Cross, Jr., Master-in Equity for Horry County, South Carolina on Tuesday, February 23, 1999.

* * * * *

evidence.

Your Honor, our Supreme Court has said that it is, per se, arbitrarily unreasonable to deny a property owner the ability to use his property in any legal fashion. And I read with interest the Delmonte decision, which is reported at 95 Federal Reporter —

THE COURT: is that the California case where they had the campground, is that that case---

MR BELLAMY: It's out in---

THE CASE: Is that that case?

MR. BELLAMY: Yes, well, it's in Monterey. And these beautiful sand dunes, if you've ever been out there, that they're just on the ocean out there, and this developer was attempting to get approval from City Council and from staff. He had a hard time getting through staff. And they were denying him, continually denying him the right to get a building permit; and, ultimately, in the 2nd Circuit, he got a

verdict of over a million dollars against the city, and the court dealt with it.

THE COURT: I don't know how much precedent a California property case would have on our Supreme Court anyway.

MR. BELLAMY: Well, our Supreme Court dealt with this, Your Honor, Delmonte Dunes came out of the Supreme Court. But it said that the Fifth Amendment is violative when land use regulations does not substantially advance legitimate state interest or denies an owner economically the viable use of his land.

Even if the city had a legitimate interest in denying Delmonte's development application, its action must be roughly proportionate to furthering that interest. That is, the city's denial must be related both in nature and extent to the impact of the proposed development.

But, primarily, Your Honor, we look to the Peterson case to give, hopefully, The Court guidance in what had occurred. If the Defendant's acts in this case are allowed to stand, CAB or Council can deny any project for any reason, regardless of the ordinance. This includes denying a project for purely personal, political, or financial reasons by simply stating the project is not compatible with existing buildings in the neighborhood. That's so subjective. There's no way in the world to tell.

CAB and City Council must have clear, specific objectives, apply them, and apply them in a

non-arbitrary, subjective manner. Although the CAB ordi[illegible]ce contains subjective criteria that can be consi[illegible]d, these criterion must be applied objectively and the Defendant must tell the applicant what must be done to get his plans approved.

Now, one of the options in the Peterson case was The Court said, if you recall, The Court, as I read that decision, went all the way through and dealt with the matter and dealt with it, and said that they disagreed, said, "The City claims both CAB and City Council based their decision on the criteria set forth in the CAB Ordinance; therefore, their decisions were not arbitrary and an abuse of discretion. We disagree." They agreed with His Honor and his ruling.

And it says that, they went on to say, "...a decision of a municipal zoning board will be overturned if arbitrary...('The exercise of police power is subject to judicial correction...if the action is arbitrary and has no reasonable relation to a lawful purpose')...(when the zoning board acts arbitrarily, its decision will not be upheld)...'the decision of the zoning board will not be upheld where it is based on errors of law...or where there is no legal evidence to support it, or where the board acts arbitrarily or unreasonably...' When exercising discretion, a local board must be guided by standards which are specific in order to prevent the ordinance from being invalid and arbitrary...instead, the decision, "was based on the unfettered will of the city)." They're talking about a Rock Hill case. ""The concept of vagueness or indefiniteness rests on the

constitutional principle that procedural due process requires fair notice and proper standards for abjudication.'"

The Courts said, in very strong language. "The CAB failed to apply any of the specific criteria of the CAB Ordinance in reaching its conclusion to deny the application, thus rendering its decision...The CAB denied the applications because it found the proposed billboards caused 'too much clutter;' they did not add to the aesthetics of the area; they did not look good;' and they were incompatible with the area. None of these reasons are enumerated as criteria the CAB is required to consider when determining whether to approve or deny a proposed structure."

"Further, during the de novo hearing, City Council failed to apply or articulate any of the specific criteria of the CAB Ordinance. The decision of the City Council was based upon the objectives and purposes of 601.2. In City Council's written order, it is considered the relationship of the billboards to surrounding properties and found 'these applications, if approved, would not enhance the appeal of the City to residents or visitors, and would not serve to foster sightly or harmonious development.' Even though 604.2 provides the objectives and purposes of 601 'shall serve as additional criteria and standards,' a decision based solely on 601.2 objectives gives rise to an unconstitutionally vague application...of the ordinance and renders City Council's decision arbitrary and capricious and an abuse of discretion."

And, finally, it says, "The 601.2 objectives are extremely broad and fail to provide any guidance to a potential applicant of the basis for denial or actions necessary to obtain CAB approval." I don't know how more clear The Court could be. "To deny a permit based solely on the ordinance's objectives grants CAB and/or City Council overly broad discretion and allows them to arbitrarily decide whether to approve a proposed structure." And we

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

RE: St. John's Inn
Applicant

THE DE NOVO HEARING
HELD BEFORE
MYRTLE BEACH CITY COUNCIL
ACTING AS THE
COMMUNITY APPEARANCE BOARD

Thursday, September 3, 1998

7:57 a.m. – 10:10 a.m.

The following is the de novo hearing held at Chapin Memorial Library, located at 400 14th Avenue North, Myrtle Beach South Carolina, before Myrtle Beach City Council acting as the Community Appearance Board on Thursday, September 3, 1998.

* * * * *

So, as I said, we are very concerned about this neighborhood. We probably have a couple of thousand, what I consider, homeowners in that area. It needed to be protected, and I think that when they say that in all these years this is the first one that's been turned down; in all of my years, I do not remember a building that has been jammed onto a site such as this one, backing up to an R zone. Most of the other projects, they tear down the old building, they come up with a better design.

I think this case is unique and that's why there, perhaps, hasn't been another case exactly like it. Thank you.

* * * * *

Mayor McBride: Thank you, Mr. Bragg. Now we'll start our discussion with the representative on behalf of the board, sir.

Mr. Barnett: Thank you, Mr. Mayor. I just have a couple of comments.

First of all, for reasons that have already been covered which I won't go over again, but the board of Sea Mark Tower Association is, of course, very concerned and does oppose this new tower, again, for many of the reasons previously stated.

Also, they are particularly concerned about the impact that this tower may have on th. wetlands that adjoin this building site. As you know, Cane Patch Swash adjoins the St. John's property, and this is a tidal marsh and, therefore, is a critical wetland, and is in the most critical category.

* * * * *

Mr. Barnett: I just wanted to raise that. I'm not going to pursue that further at this time, but did want to mention it, that, that, again. I think it affects the jurisdiction and, secondly, and most important for the purposes of this hearing, did not allow us to respond. But I am concerned, quite, and

the association board is quite concerned about the critical area adjacent.

Also, there is great concern by the association about the additional traffic which would be put in this area. These are side streets. This is a ninety-eight unit tower. It's going to have, in that event, probably a hundred plus cars that are going to be added. I don't know if traffic studies are going to be, have been done, what they show, but they're very concerned about the additional traffic flow.

* * * * *

This is my home and the home of nine other families. We don't have lawn mowers, we don't have bird baths, but we live here. Anybody else want one? You get used to seeing these condos and you assume that they're all full of tourists. But all over town you have people who used to be tourists and then they moved here. But I'm going to talk about Sea Mark Towers and make a point about the neighborhood, I may need a little bit of help here. I don't know.

Mr. Helms: I tell you what. Why don't we put one of these up here behind that to support that for you.

Ms. Bosworth: That would probably be a pretty good idea. Thank you.

Mr. Helms: Sure.

* * * * *

squeeze play. And now we have the St. John's being crammed into our neighborhood.

My specific concerns are these: The site is environmental density, we can talk about trench drain systems all we want, but the water has to go somewhere and it's going to leach into the ground. Has there been a study by a structural engineer relative to the improbability of damage to nearby buildings and homes by having construction equipment.

What about the parking garage? Will residents trying to enjoy their porches and balconies be driven inside by exhaust fumes of over a hundred additional automobiles?

What about the dumpster, where is that supposed to be? Where is the air conditioning complex with all the attendant noise, the generators, the pumps?

What sort of lighting will there be? Will it light up the whole neighborhood as the Patricia North does? You could almost do brain surgery at the Patricia North for pete's sake.

What about the shadow affect, will the high-rise block the sun from the neighborhood?

How do we avoid the constant aggravation of observing the balconies at St. John's being used twenty-four hours a day with guests checking in and out, maids cleaning, all within a short distance of our homes?

The proposed tower would be an incongruity in the neighborhood. It would be the kind of in your face structure that doesn't even blend aesthetically with the original building for the St. John's. The proposed tower is already affected property values in that some residents are have difficulty selling their properties because of the proposed St. John's.

Council members, your Community Appearance Board exhibited a great deal of courage in denying a building permit for this project, I commend them for their vision. And now you come to your la momento de verdad, your moment of truth. Is visioning for real, or is it just an

* * * * *

I thank you very much for your time and attention.

Mayor McBride: Thank you, Ms. Ferguson. Mr. Reimer?

Mr. Reimer: I'm Arthur Reimer and I live at Sea Mark Towers. All my colleagues have made some very good points and perhaps I might be a little redundant, but I'll say what I have to say.

When the people speak we hope that you, the powers that be, our representatives, are listening; and we are aware that you have a tough job. People speak when they suffer and their well-being is threatened. We're now talking about the proposal by St. John's.

Crowding the proposed addition behind their present facility, they would have the garage area facing very close to the adjoining Sea Mark Tower with the resulting automobile noise and the coming and going of vehicles at all hours to the detriment of the adjacent homeowners. But more than this, the garage would exit onto 69th Avenue North,

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

RE: St. John's Inn

THE DE NOVO HEARING
HELD BEFORE
MYRTLE BEACH CITY COUNCIL
ACTING AS
COMMUNITY APPEARANCE BOARD

Tuesday, November 10, 1998

7:30 p.m. – 8:50 p.m.

The following is the de novo hearing held at the Myrtle Beach Law Enforcement Center located at 1101 North Oak Street, Myrtle Beach, South Carolina, before Myrtle Beach City Council acting as the Community Appearance Board on Tuesday, November 10, 1998.

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what I perceive to be the truth
best interest of the community.

However, when I found out this was coming back before us, I went through all of my minutes again. The one document that Mr. Pegram was referring to, saying this was a zoning issue and not a CAB issue and as far as what would be approved by CAB, Mr. Pegram knows very well, prior to the meeting of September 17th. I explained to him that that building is a site specific problem placed on that site, that the developer should originally come, as so many developers did, not making a tunnel effect on the Boulevard, tearing down the old structure, putting it closer to the Boulevard and still green space there, funneling the traffic out to Kings Highway, and I've heard so many times, they want to maintain the architectural integrity of that building. The reason that Mr. Pegram said they do not want to do that was a question of economics, they wanted to keep the old building so they could make money off of it.

Mr. Pegram also said to me that he

* * * *

Mayor McBride: Thank you, Mr. Bragg. At this time we'll go to our fifteen minutes of the public, and I would only entertain that we ask Mr. Barnett to come first. Please, be respectful. If one of y'all goes twelve of fifteen, perhaps it would cut out other residents that would like to have something to say.

Mr. Barnett: Thank you Mr. Mayor. I'm here tonight representing the Sea Mark Tower Property Owners' Association which is one of many people and many groups in this area who are concerned about this proposed tower. There are a number of concerns. I'm just going to speak for about one minute and sit down so others can speak.

The association's particularly concerned about the location of this tower being place right next to Sea Market Tower. It will be in very close proximity. The positioning of the tower will cause a wind tunnel effect, which we have an engineer here who I will introduce on behalf of our association to speak as soon as I sit down. There will be a shadow effect. The wind tunneling effect will affect not only the neighboring areas but also the balconies of the condominium building where my clients live.

The solid waste compactor is still in an unsightly position where it was first proposed and which has been objected to from the beginning. It's going to be right next to our, my clients' property. There will be an increase in traffic flow. The groundwater – I'm sorry, the water, wastewater management is proposed to go into underground pipes which are perforated; and, as you know, this particular site is right next to a swash which is a critical area.

They're bringing a hundred and thirty new automobiles onto this property. All the oil and gas which drips from those and eventually washes into those perforated pipes will work, will make its way

into this swash because of this site. This is not a suitable location for this sort of thing.

The trees and shrubs which they propose to plant will be, largely, in a very narrow area which is shaded by these two large buildings next to each other. They will not survive. It will be unsightly. There are any number of reasons. I won't go into all of them; but I did want to express my clients' concern, and at this time would like to introduce Mr. Jim Justice, who is an engineer who would like to speak to several of these issues. Thank you.

Mr. Justice: My name is Jim Justice. I am a representative of Law Engineering. I work out of the Greenville, South Carolina office. I'm a registered engineer in seven states throughout the Southeast and the Midwest. I currently have ongoing projects in New York City, Chicago, Atlanta. So, I am familiar with high-rise applications and the building of high-rise buildings.

The thing, where I was involved with this project is I was doing unrelated work for the Sea Mark Towers in terms of renovation and repair work for them. When this issue came up with the St. John's, they asked me to do a very quick and very brief review of the drawings, the preliminary drawings, that were presented before the CAB

* * * * *

I'll skip all the introductions and stuff. This project that is now before us appears to be the same project you unanimously turned down a few weeks ago.

What would the developer have you do? He would rather have you change your mind than he change his plans. He, along with the builder and the Hoffman Group, have all made it clear that nothing is going to stop them from building this project. It is enough to make one think that the visioning process and the city's comprehensive plan mean nothing, let alone City Council and the CAB's opinion.

Quite a few of us were involved in these processes. And, one thing that is obvious is that at some time someone is going to have to say no to a developer. This project, where they are trying to put a size nine and half foot in a seven shoe, is the perfect place to start.

It's interesting that the city's visioning process was dubbed "It's Time," not one of these days, or sooner or later, or when we get around to it, but "It's Time." Let the developers know that it's time, time

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

RE: St. John's Inn
Applicant

THE DE NOVO HEARING
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Thursday, September 3, 1998

7:57 a.m. – 10:10 a.m.

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* * * * *

meeting was, the scheduled time for this meeting was certainly not conducive to a large turnout. However, over two hundred of my neighbors have entrusted me with their signatures to be used "To preserve," I'll quote this, "and protect the residential lifestyle that exists today." A copy of this signature list was turned over the Community Appearance Board at the last meeting.

As I'm sure you're aware, our neighborhood has changed in the last two years from the summer homes and beach houses of the past to the year around residences of retirees and young families alike. Perhaps it is time for our city planner to look at these changing dynamics and adjust the zoning to provide more protection.

With all this in mind, please, consider what burgeoning a second row of high rise towers will have on our tiny enclave. Surely, if the St. John's Inn is permitted to build what they now have planned, it will be the beginning of a domino effect.

It is very easy to see this lovely community of friends and neighbors being turned into the next Shore Drive with twelve story buildings stretching from 69th Avenue to the grand dunes. Quite a few of us are active participants in the city's recent visioning process and there is no doubt that the people did not envision this scenario.

Each of us has endorsed this process and we feel that, as it was originally entitled, it's about time.

With that, I'd like to ask each member of City Council to, please, stand behind the decision rendered by the Community Appearance Board and thanks again for your time.

Mayor McBride: Thank you, Mr. Holst. And the last lady to speak today is Ms. Maureen Altman.

Ms. Altman: I was hoping you'd pick me first. I've worked all night long, so I stayed up for this.

This is a petition that we

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

RE: St. John's Inn

THE DE NOVO HEARING
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Tuesday, November 10, 1998

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* * * * *

city process, and I hope that you will take it as such.

One of my concerns is that, if this developer is allowed to build a substandard project that will affect the neighborhood, think what the next ten marching up that street, on that side of the street, what impact they will have on the infrastructure, on traffic, on drainage, and all of the other problems that we've heard about.

I hope that the Council did not hear a reason tonight to change its mind. Thank you very much for listening and for being a part of the process as I think the ordinance suggests that you should be. Thank you, Mr. Mayor.

Mayor McBride: Could the previous speaker give your name, please?

Mr. Strauber: I'm sorry. My name is Bob Strauber, S-T-R-A-U-B-E-R.

Mayor McBride: Thank you.

Ms. Grove: They have four minutes and thirty-five seconds.

Mayor McBride: You have four minutes and thirty-five second, ma'am.

that very well. You always---

A: Of coming back, you know, with, with a---

Q: But this forms your record?

A: That's what is given to the applicant.

Q: And from this document he files his application for appeal?

A: I've never seen an applicant do it; but I'm assuming that's probably what they would have to use---

Q: This is the basis of the denial of the application?

A: Yes.

Q: And this is the record of the denial of that application?

A: That's what I think we've used.

Q: That's all I have.

RE-EXAMINATION

BY MS. CANTWELL:

Q: You attended the September hearing before the City Council as it was sitting in the capacity of the CAB as an appeal from your board?

A: Which---

Q: I'm sorry, the September 3, 1998 hearing. I don't know where it was located, maybe at the library.

A: That would have been the first one, yes.

Q: And were you there?

A: Yes.

Q: Had your board seen those elevations before?

A: No, none of it.

Q: Now, when Mr. Pegram came back before your board in October at the Magic---

A: Attic.

Q: ---Attic, did he present elevations to you then?

A: Yes. It was what was presented at the Council meeting.

Q: The Council meeting of September 3?

A: Right.

Q: Thank you.

RE-EXAMINATION

BY MR. BELLAMY:

Q: But what you had at that October 1 meeting was a full rendering and a complete set of plans and specifications?

A: No.

Q: October 1, at the Magic Attic?

(3)

No. 05-802

Supreme Court, U.S.
FILED
MAR 2 0 2006
OFFICE OF THE CLERK

In The

Supreme Court of the United States

SUNRISE CORPORATION OF MYRTLE BEACH; BOULEVARD DEVELOPMENT LLC; S&H DEVELOPMENT INC.,

Petitioners,

v.

THE CITY OF MYRTLE BEACH; MARK McBRIDE; JUDY RODMAN; RACHAEL BROADHURST; CHARLES MARTINO; WILSON CAIN; CRAIN WOODS; LARRY BRAGG; TOM CONN; TOM DAVIS; SALLY HOWARD; FRED ROURK, Individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

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ISSUES BRIEFED IN REPLY

Petitioners respectfully submit this Brief addressing the following points, newly raised by Respondents' Brief in Opposition:

1. **THE COURT SHOULD ADDRESS A SPLIT BETWEEN THE CIRCUITS: SHOULD AN ENTITLEMENT BAR APPLY IN SUBSTANTIVE DUE PROCESS LITIGATION IN LAND-USE CASES – AN ISSUE THE FOURTH CIRCUIT SHOULD HAVE ADDRESSED**

2. **THE NUMEROUS FINDINGS OF FACT, CONCLUSIONS OF LAW, AND EXPRESS HOLDINGS CONCERNING RESPONDENT CITY'S OPPRESSIVE AND EGREGIOUS BEHAVIOR ARE THE LAW OF THE CASE**

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2. THE NUMEROUS FINDINGS OF FACT, CONCLUSIONS OF LAW, AND EXPRESS HOLDINGS CONCERNING RESPONDENT CITY'S OPPRESSIVE AND EGREGIOUS BEHAVIOR ARE THE LAW OF THE CASE 3

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1. THE COURT SHOULD ADDRESS A SPLIT BETWEEN THE CIRCUITS: SHOULD AN ENTITLEMENT BAR APPLY IN SUBSTANTIVE DUE PROCESS LITIGATION IN LAND-USE CASES – AN ISSUE THE FOURTH CIRCUIT SHOULD HAVE ADDRESSED

This Court should address the split between the circuits regarding the use of an entitlement bar as a threshold test in substantive due process claims in land-use cases. Respondents' Brief in Opposition would have the Court believe this task is unnecessary because the Fourth Circuit evaluated the municipal behavior in question and found there was no due process violation on the merits. This argument is opportunistic.

If the entitlement bar applies in land-use litigation, conscious shocking behavior that would violate the Due Process Clause is irrelevant.[1] Accordingly, the District Court below applied the entitlement bar and subsequently held that any abuse of discretion "is immaterial."[2] Thus, any discretion within a municipality's own ordinance will absolutely preclude any review of oppressive and egregious governmental behavior in land-use cases. Contrary to Respondents' contention, behavior could not have been a factor that was addressed by the Fourth Circuit.[3]

---

[1] Resp. Br. in Opp'n. at 8 (*citing Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (conduct is actionable under 42 U.S.C. § 1983 when it "shocks the conscience")).

[2] Dist. Ct. Order, App. at 23.

[3] Resp. Br. In Opp'n. at 6 (While the Fourth Circuit did characterize one portion of Petitioners' claim, Petitioners have never asserted that the City's actions were solely or simply arbitrary, *see e.g.* Br. of Pet. at 5, 22).

As Petitioners have noted, there is a deep and enduring split between the circuit courts of appeals on the entitlement bar. A majority apply the bar, but as Respondents note, two circuits have absolutely refused to apply the entitlement bar as a threshold analysis in land-use cases.[4] Oddly enough, these two circuits are the **only** courts that have addressed the fundamentally flawed logic of the entitlement bar, *i.e.*, that property ownership is not simply a municipal benefit.[5] Real property ownership is, and always has been, a property interest worthy of protection under the substantive due process clause.[6] Logic resoundingly favors the minority analysis, and this Court should adopt it.

Respondents' Brief in Opposition notes the only logical reason for the use of the entitlement bar in land-use cases: judicial convenience.[7] This is the case to address the fundamental flaw in the majority analysis.

The Constitution dictates that this Court should not turn a blind eye upon a fundamentally flawed and sharply criticized analysis that has absolutely precluded review of conscious shocking behavior in this land-use case — simply for the sake of convenience.

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[4] Resp. Br. in Opp'n, at 7, n. 1. (*citing River Park v. Highland Park*, 23 F.3d 164 (7th Cir. 1994); *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592 (3d Cir. 1995).

[5] *River Park*, 23 F.3d at 165-66; *DeBlasio*, 53 F.3d at 600-01.

[6] *Id.*

[7] Resp. Br. in Opp'n, at 2 (The entitlement bars is simply a means of "preventing federal courts from being forums for questioning local zoning decisions.").

2. THE NUMEROUS FINDINGS OF FACT, CONCLUSIONS OF LAW, AND EXPRESS HOLDINGS CONCERNING RESPONDENT CITY'S OPPRESSIVE AND EGREGIOUS BEHAVIOR ARE THE LAW OF THE CASE

Respondents' Brief in Oppositions cites *Barth v. Barth*,[8] as support for the proposition that several express holdings and extensive findings of fact within the Trial Court Order[9] were impliedly abrogated or modified by the South Carolina Court of Appeals. First, the *Barth* case does not provide any support for this assertion. Second, the Trial Court Order was affirmed with an "any evidence" standard of review, *in toto*, and without any modification.

The issue in the *Barth* case was whether Dr. Barth was obligated to pay interest on his ex-wife's equitable distribution award during the pendency of an appeal during prior litigation.[10] In that case the parties had expressly agreed that this issue could be revisited in subsequent litigation.[11]

The behavior of Respondent City was litigated throughout every stage of the prior litigation. Obviously, there was no agreement or exception that would allow for the revival of this same issue between the parties now before this Court. Therefore, *Barth v. Barth* is irrelevant.

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[8] 293 S.C. 305, 308, 360 S.E.2d 309, 310 (S.C. 1987).

[9] Trial Ct. Order, App. at 34-80.

[10] *Barth*, 360 S.C. at 310.

[11] *Id.* ("exceptions [in prior litigation] were specifically framed ... thus reviving the issue for re-examination in this case.").

Respondents' Brief in Opposition indicates that the review of the Court of Appeals was restricted by the same "any evidence" standard of review. The Court of Appeals decision states that evidence did exist that would support the Trial Court Order, and it was therefore affirmed, **without any modification**.

Under 28 U.S.C. § 1738, the sole issue is whether a Court of the State of South Carolina would be bound by the Trial Court's express conclusions of law finding Respondent City's actions were "a denial of [Petitioners'] due process and equal protection rights."[12] These holdings were supported by an extensive review of the City's conduct, which was found to be in "flagrant disregard" of state law,[13] as "per se arbitrary and unreasonable."[14]

As to the Respondent City's oppressive and arbitrary behavior, preclusive effect should be given to the holdings and findings of the state trial court. In the alternative, and at a minimum, these findings are competent evidence, and therefore this case should not be summarily dismissed.

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[12] Trial Ct. Order, App. at 46, 80.

[13] Trial Ct. Order, App. at 63 ("Defendant's actions in the case are in flagrant disregard of the Supreme Court's ruling in Peterson"); see also Trial Ct. Order, App. at 65, 67, and 69.

[14] Trial Ct. Order, App. at 72.

CONCLUSION

Petitioners respectfully pray this Court will grant the Petition for Certiorari to address the split between the circuits, and to declare that Respondents' abusive and oppressive behavior is in fact relevant in the analysis of their due process claims.

Respectfully submitted,

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